United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No. 2202.

761

DORA F. ROBINSON AND C. BARNWELL ROBINSON,
APPELLANTS,

vs.

MYRA T. HILLMAN AND ELIZABETH CLEMENT.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED AUGUST 10, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 17, 1910.

In the Court of Appeals of the District of Columbia.

No. 2202.

DORA F. ROBINSON et al., Appellants,
vs.
MYRA T. HILLMAN et al.

---

a Supreme Court of the District of Columbia.

At Law. No. 51682.

MYRA T. HILLMAN, ELIZABETH CLEMENT, Plaintiffs,
vs.
DORA F. ROBINSON, C. BARNWELL ROBINSON, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed Jun- 3, 1909.

51682.

MYRA T. HILLMAN, ELIZABETH CLEMENT, Plaintiffs,
vs.
DORA F. ROBINSON, C. BARNWELL ROBINSON, Defendants.

The plaintiffs Myra T. Hillman and Elizabeth Clement sue the defendants Dora F. Robinson and C. Barnwell Robinson, for that whereas, the said plaintiffs before and at the time of the committing of the grievances by the said defendants as hereinafter mentioned, were and from thence hitherto hath been, and still are lawfully possessed of certain premises known as house No. 227 Third Street Northwest in Washington, District of Columbia, described as parts of lots 12 and 13 in Reservation 11, beginning for the same at a point on the line of Third Street West 16 feet 8 inches South of the North-

west corner of lot 13, thence South 16 feet 8 inches; thence East 100 feet; thence North 16 feet 8 inches, thence West 100 feet to the beginning; and the said plaintiffs during all the time aforesaid up to the time of the committing of the grievances by the said defendants, hereinafter mentioned, had and enjoyed, and still of right, ought to have and enjoy a certain way, or easement of ingress, egress and regress, unto, into, through and over a certain parcel or strip of land four feet wide running North and South affording access
2 from the rear of the property above described to the fourteen feet public alley adjoining said lot 13 on the North; the said four foot strip being now included within the lines of what is now known as lot 36 in Dora F. Robinson's sub-division of a part of said Reservation 11 as shown on the plat thereof recorded in the office of the Surveyor of the District of Columbia in Book 33 page 152 and being the West four feet of said lot 36, for the use and enjoyment of themselves and their agents and servants, and as a means for the removal of ashes, garbage and refuse, and from the premises above described to the public alley aforesaid, and as a means of ingress and egress for the tradesmen and servants whereby to deliver coal, wood and other merchandise at the rear of the premises aforesaid. Yet the said defendants well knowing the premises, but wrongfully and unjustly contriving and intending to injure the said plaintiffs in that behalf, and to deprive them of the use and benefit of said way, on, to wit, the first day of July, 1908, and on divers other days and times between that day and the day of commencing this action, wrongfully and injuriously placed and erected, and caused to be placed and erected, in and upon said strip of land, a five-story brick structure entirely obstructing and closing up said way, by means whereof during all the time aforesaid said way was and still is, and will continue to be entirely obstructed and closed up and will be permanently obstructed and closed, so that the plaintiffs have not had, since the times aforesaid, the use and enjoyment of said way and will be deprived thereof at all times in the future to
3 their damage in the sum of $20,000.00, wherefore they bring suit.

And the plaintiffs claim $20,000.00 besides costs.

2. The plaintiffs Myra T. Hillman and Elizabeth Clement further sue the defendants, Dora F. Robinson and C. Barnwell Robinson for that whereas, the said plaintiffs before and at the time of the committing of the grievances by the said defendants as hereinafter mentioned, were and from thence hitherto hath been and still are lawfully possessed of certain premises known as house No. 227 Third Street N. W., in Washington, District of Columbia, described as parts of lots 12 and 13 in Reservation 11, beginning for the same at a point on the line of Third Street West 16 feet 8 inches South of the Northwest corner of lot 13, thence South 16 feet 8 inches; thence East 100 feet; thence North 16 feet 8 inches; thence West 100 feet to the beginning; and the said plaintiffs during all the time aforesaid up to the time of the committing of the grievances by the said defendants hereinafter mentioned, had and enjoyed, and still of right, ought to have and enjoy the use of certain sewerage waste

and drain pipes running through what is now known as lot 36 in Dora F. Robinson's sub-division of part of Reservation 11, as per plat thereof recorded in the office of the Surveyor of the District of Columbia in Book 33 page 152, connecting the premises above described with the public sewer located in the public alley 35 feet wide adjoining said lot 36 on the East and used for carrying off the sewerage and waste from the premises aforesaid to the said public sewer. Yet the said defendants, well knowing the premises, but wrongfully and unjustly contriving and intending to injure the said plaintiffs in that behalf and to deprive them of the use and
4 enjoyment of said sewerage waste and drain pipes and the means of outlet for the sewerage and waste aforesaid, on to wit, the first day of July, 1908, and on divers other days and times between that date and the date of the commencement of this action, wrongfully and injuriously tore up said pipes, thereby closing the outlet for the sewerage and waste of the premises aforesaid and constructed and caused to be erected on said lot 36 through which said pipes ran, a five-story brick building, permanently depriving the plaintiff of the use and enjoyment of said pipes, and the public sewer located in said 35 feet alley, and rendering it necessary for the plaintiffs to install new plumbing in said house and to tear up the floors of the lower rooms of said house and to excavate thereunder and install new plumbing in said house and connect the same with the public sewer in Third Street in front of said house, thereby depriving the plaintiffs of the use of said lower floor during the time consumed in installing said new plumbing, creating stench, filth and noisome odors therein, endangering the life and health of the plaintiffs and rendering the said house during the time aforesaid, unfit for habitation and injuring and damaging the walls, decorations and woodwork of said house and the furniture contained therein to the damage of the plaintiffs in the sum of $20,000.00.

Wherefore, they bring this suit; and the plaintiffs claim $20,000.00 besides costs.

PENNEBAKER, CARUSI & JONES,
Attorneys for Plaintiffs.

5 *Notice to Plead.*

The defendants are to plead hereto, on or before the 20th day, exclusive of Sundays and legal holidays, occurring after the day of service hereof, otherwise judgment.

PENNEBAKER, CARUSI AND JONES,
Attorneys for Plaintiffs.

Plea of Both Defendants.

Filed Jun- 22, 1909.

* * * * * * *

The defendants jointly and severally for a plea to each count of the plaintiffs' declaration say that they are not, nor is either of them,

guilty of the said supposed grievances in said declaration mentioned or any or either or any part thereof, in manner and form as the plaintiffs have alleged.

GEO. A. PREVOST,
LORENZO A. BAILEY,
Attorneys for Defendants.

Joinder in Issue.

Filed Jun- 25, 1909.

* * * * * * *

The plaintiffs join issue upon each and every of the pleas
6 of the defendants herein.

PENNEBAKER, CARUSI AND JONES,
Attorneys for Plaintiffs.

Memorandum.

April 11, 1910.—Verdict for Plaintiffs $1,500.00 under 1st count and $500 under second count declaration.

Supreme Court of the District of Columbia.

THURSDAY, *April* 21, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * * * *

Upon hearing the motion of the defendants for a new trial, it is considered that the same be, and hereby is overruled, and judgment on verdict ordered.

Whereupon the plaintiffs by their Attorneys freely remit to the defendants the sum of Eighty five and 36/100 ($85.36) of the verdict of the jury herein assessed under the second count of the declaration.

Therefore, it is considered that the plaintiffs recover against the defendants the sum of Fifteen hundred dollars ($1500.00) with interest thereon from this date, being the money payable by said defendants to the plaintiffs by reason of the premises as laid
7 in the first count of their declaration, and also recover against said defendants the further sum of Four hundred and fourteen and 64/100 dollars ($414.64) with interest thereon from this date, being the money payable by said defendants to the plaintiffs by reason of the premises as laid in the second count of their declaration, together with their costs of suit, to be taxed by the Clerk, and have execution thereof.

The defendants by their attorneys in open court note an appeal to the Court of Appeals of the District of Columbia, and the penalty of the bond on said appeal to act as a supersedeas, is hereby fixed in the sum of Three thousand dollars, ($3000).

Memoranda.

April 25, 1910.—Appeal bond approved and filed.
June 3, 1910.—Bill of Exceptions submitted and time to file record extended to Aug. 15, 1910, inclusive.

Supreme Court of the District of Columbia.

TUESDAY, *July* 19, 1910.

* * * * * * *

Now come here the defendants by their Attorneys and pray the Court to sign, seal and make part of the record their bill
8 of exceptions taken at the trial of this cause (heretofore submitted) now for then, which is accordingly done.

Bill of Exceptions.

Filed Jul- 19, 1910.

* * * * * * *

Be it remembered, That at the trial of this cause in the Supreme Court of the District of Columbia before the Honorable Daniel Thew Wright, one of the Associate Justices of said Court and a jury, being cause at law No. 51,682, wherein Myra T. Hillman and Elizabeth Clement are named as plaintiffs and Dora F. Robinson and C. Barnwell Robinson are named as defendants, which trial was begun on the fifth day of April, A. D. Nineteen Hundred and ten and ended on the eleventh day of April, A. D. Nineteen hundred and ten, evidence was adduced and proceedings were had as follows:

First, to maintain the issues on their part joined the plaintiffs adduced evidence, tending to prove that the two parcels of land situate in the City of Washington in the District of Columbia, known as Lots numbered respectively 12 and 13 in Reservation 11, being the same Lots 12 and 13 mentioned in their declaration were lots adjoining each other and fronting on Third Street Northwest, each having a width of 25 feet and a depth of 150 feet; that
9 the said two lots combined were bounded by a line beginning at the Northwest corner of said Lot 13, being at a point where the East line of said Third Street intersects the South line of a public alley 14 feet in width, and running thence Easterly along the South line of said alley 150 feet to the intersection of said South line with the West line of a public alley 35 feet in width, being the northeast corner of said Lot 13, thence Southerly along the West line of said last above mentioned alley 50 feet to the Southeast corner of said Lot 12, thence Westerly along the South line of said lot 12 to the East Line of Third Street aforesaid, and thence northerly along the said East line of Third Street to the place of beginning aforesaid; that the said lots 12 and 13 were divided by a line commencing on the East line of said Third Street

25 feet Southerly from the Northwest corner of Lot 13 aforesaid and running thence Easterly 150 feet to a point, on the West line of the alley 35 feet in width last above mentioned, and distant 25 feet southerly from the Northeast corner of said Lot 13.

Next, the plaintiffs put in evidence, successively, certain written instruments, as follows:

Duly certified copies of two deeds from Robert Keyworth to Hugh Gelston one dated October 19, 1830, and the other dated October 26, 1835, recorded respectively November 2, 1830, and October 26, 1835, and conveying in fee simple respectively lots 12 and 13 in reservation 11.

Duly certified copy of lease from Hugh Gelston to Edward Wools dated July 20, 1868, and recorded July 21, 1868, demising for 99
years from the day next before the date of said deed parts of
10 lots 12 and 13, reservation 11, which said parts are in said
lease described as containing and embracing fifty feet front and a depth of same width of One hundred feet the same to be divided into three separate and distinct Leases of sixteen feet eight inches front with a depth of two thirds of said whole having for each a depth of one hundred feet respectively described as follows, to wit: Beginning for the first of said three lots at the Northernmost side of the whole lot and is bounded by a paved public alley fourteen feet wide connecting Third Street with the Street next adjoining on East of it and has sixteen feet eight inches front and one hundred feet depth. Beginning for the second lot adjoining and on the Southernmost side of number one and has for front depth and size the same dimensions and is the centre lot of the three lots intending to be described; beginning for the third lot adjoining and on the southernmost side of number two and has for front, depth and size the same dimensions of number two the centre lot which three lots above described contain the whole fifty feet front and one hundred depth of portion of reservation 11; including as the lot therein secondly described the land referred to in the declaration as premises No. 227 3d St., N. W., said lease containing also the following language in the premises, "together with the improvements thereon, and all and every the rights, privileges, advantages and appurtenances to the same belonging or in anywise appertaining."

Deed of assignment from Edward Wools et ux. to Seth Hillman,
dated September 27, 1869, recorded October 2, 1869. assign-
11 ing "All the right, title, and interest, the parties of the first
part, may have, by virtue of a lease thereof from Hugh Gelston and wife dated July 20th, 1868, and recorded in Liber No. 563, at folio 283, et Seq. one of the land records for Washington County, D. C., in and to all that piece or parcel of ground situate in the said City of Washington, and known and designated as parts of lots numbered twelve and thirteen (12 and 13) in reservation numbered Eleven (11). Beginning for the same at a point on the line of Third Street West sixteen feet and eight inches South of the Northwest corner of lot numbered thirteen in said square, and running thence south sixteen feet and eight inches, thence East

one hundred feet, thence North Sixteen feet and eight inches thence West one hundred feet to the place of beginning, together with all the improvements, ways, easements, rights, privileges and appurtenances to the same belonging, or in anywise appertaining."

Duly certified copy of deed from Seth Hillman to Lizzie Clements dated July 21, 1870, and recorded August 1, 1870, assigning by the same description the same property as is described in the deed of assignment from Wools to said Hillman last above mentioned.

Duly certified copy of assignment from Lizzie Clement to Ann B. Hillman dated August 15, 1870, recorded August 16, 1870 assigning the grantor's interest in the same property as is described in the last preceding deed from Seth Hillman to said Clements and using the same language.

Duly certified copy of Hugh Gelston's will dated May 26, 1873, whereby after certain devises and bequests not affecting the
12 property in controversy he devises all the residue of his estate of every description to his three (3) children, Edward H. Gelston, Victor D'L. Gelston and Rebecca Elise Gelston, as tenants in common in fee.

Duly certified copy of deed dated January 3, 1876 recorded March 23, 1876, from Edward H. Gelston and wife, Victor D'L. Gelston and wife and Rebecca G. Gelston, widow of Hugh Gelston, deceased, to Rebecca Elise de Machado, formerly Gelston, conveying among other property all those two lots of ground lying on the east side of 3d street in the said City of Washington which are respectively secondly and thirdly described in said lease bearing date 20th of July 1868, "together with all the rights, water courses, lights, liberties, privileges, easements, and appurtenances to the said several lots of ground and premises hereby granted and conveyed or expressed or intended so to be, belonging or in anywise appertaining"; which said deed recites that it is made in pursuance of the agreement and for the consideration recited and mentioned in a certain deed bearing even date therewith and intended to be recorded, amongst the land records of the City of Baltimore and State of Maryland and made between the said Edward H. Gelston, and wife and Victor D'L. Gelston and wife of the first part and the said Rebecca G. Gelston of the second part and the said Rebecca Elise de Machado of the third part;

Duly certified copy of deed from Rebecca E. de Machado to Edward H. Gelston and Victor D'L. Gelston dated January 3, 1876 and recorded November 29, 1876, conveying to the said Edward H. and Victor D'L. Gelston to be held by them free and released
13 from any claim of her, the said Rebecca E. de Machado, the remaining portion of said lots 12 and 13; which deed recites that it is made in pursuance of a certain agreement and for the consideration recited and expressed in a certain deed bearing even date therewith and intended to be executed by the parties thereto "immediately after the execution of these presents and to be recorded along with these presents amongst the land records of the City of Baltimore" and made between the said Edward H. Gelston and wife and Victor D'L. Gelston and wife of the first part and Rebecca G.

Gelston of the second part and Rebecca Elise de Machado of the third part;

A duly certified copy of the last will and testament of Ann B. Hillman as follows:

Last Will and Testament of Ann B. Hillman.

In the name of the Benevolent Father of All, I, Ann B. Hillman (widow), of the city of Washington, District of Columbia, being of sound and disposing mind, memory and understanding, and desiring and intending hereby to dispose of all my estate and property, real, personal and mixed, which I now own or have any power of disposition or of appointment, and all that I may hereafter acquire or become entitled to or have any power of disposition or of appointment, do make, publish and declare this to be my last will and testament, hereby revoking and annulling all other wills and testamentary dispositions by me made.

Item I. I hereby give, devise and bequeath unto my daughters, Elizabeth Clement and Myra T. Hillman, my executrices hereinafter named, the survivor of them, her executors, administrators
14 or heirs, in fee simple, all my said estate hereinbefore in this my last will and testament mentioned, in trust, to sell and convey in fee simple, or in any lesser estate, rent, lease, mortgage, release and otherwise dispose of, invest and re-invest as the said trustees, or the survivor of them, her executors, administrators, or heirs may desire, the whole or any portion of my said estate, but without any requirement on the part of any person dealing with them or either of them, to see to the application of any money paid them.

Item II. I desire and direct that all my just debts and funeral expenses shall be paid.

Item III. I give, devise and bequeath to my two daughters, Elizabeth Clement and Myra T. Hillman, the brick house known as No. 227 Third street, N. W., Washington, D. C. (on the conditions hereinafter provided for), together with all the rest and residue of my estate, including my household and other personal effects of every kind and description wheresoever found which I may be possessed of at my death, to have and to hold the same for their sole use and benefit, to be equally divided between them.

Item IV. I give, devise and bequeath to my son, Richard D. Clement, the sum of Three hundred ($300) dollars.

Item V. I give, devise and bequeath to my son, Townsend Clement, the sum of One hundred ($100) dollars.

Item VI. In order to provide a fund out of which the above mentioned legacies are to be paid to my two sons, I hereby direct my executri-es to sell, at either private or public sale, the brick house No. 227 Third street, above referred to, at such time and place
15 as they may deem advantageous, within two years after my death, and out of the proceeds of said sale to pay to my son Richard D. Clement, the sum of Three Hundred ($300) dollars, and to my son, Townsend Clement, the sum of One hundred ($100)

dollars, as hereinbefore provided for, and the remainder of the proceeds of said sale shall be equally divided between my two daughters, Elizabeth Clement and Myra T. Hillman.

Item VII. It is my wish and desire, however, that my two daughters shall keep and occupy the said house as a place of residence as long as it may be convenient and agreeable for them to do so, and if my said daughters shall choose to pay to my two sons the legacies hereinbefore provided for out of their private funds (the receipt of which by my sons shall be considered as full settlement of all their claims against my said estate), then the sale as hereinbefore provided for need not be made until such time as my said daughters may elect—the entire proceeds of which, when a sale is so made, shall then be equally divided between my two daughters.

Item VIII. I hereby nominate and appoint my two daughters, Elizabeth Clement and Myra T. Hillman, my executrices of this my last will and testament, and direct that they be not required to give bond or other security.

In testimony whereof, I, Ann B. Hillman, have hereunto set my hand and seal at the city of Washington, in the District of Columbia, to this my last will and testament, this 27th day of June, in the year of our Lord one thousand eight hundred and ninety nine (1899).

ANN B. HILLMAN. [SEAL.]

16 Signed, sealed, published and declared by Ann B. Hillman, the above named testator, as and for her last will and testament, in our presence, who, at her request, in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses hereto.

JAMES A. HARTSOCK, 1014 8*th St. N. W.*
J. S. B. HARTSOCK, 1014 8*th St. N. W.*
WALTER E. WRIGHT, 619 *E St. N. W.*

Witnessed by us this 27th day of June 1899.

Next the plaintiffs adduced evidence tending to prove that the said Edward Wools built three brick houses upon the said demised premises, said houses fronting on Third Street, each having a height of four stories and a width of 16 feet and 8 inches, and numbered respectively, from South to North 225, 227, and 229 Third Street, Northwest; that during the year 1869 the said Seth Hillman, under the said conveyance to him from Edward Wools, dated September 27, 1869, moved into said house and premises No. 227, accompanied by his family consisting of his wife Ann B. Hillman and his daughter Myra T. Hillman and his wife's daughter Elizabeth Clement, and thereafter occupied the same as his home until his death during the year 1871, and that the said Ann B. Hillman occupied the same as her home until her death on November 13, 1902, and that the plaintiffs, the said Myra T. Hillman and Elizabeth Clement have occupied the same as their home ever since the year 1869 and do not own any other property in Reservation 11; that when Seth Hillman, in 1869, moved into said house No. 227, it was a new house and had

never been inhabited before that time; that the rear end,
17 being the Eastern end, of the demised premises was then occupied by wooden sheds for the use of the respective occupants of said three houses; that a year or so after said three houses were built, four brick houses, referred to as the "Alley houses" were built by Hugh Gelston on the Eastern end of said Lots 12 and 13 and fronting on the 35 foot alley aforesaid, and a fence was built at the rear of said four alley houses four feet east of the rear of said sheds and the private alley referred to in the plaintiffs' declaration as a "four foot strip" then came into existence. It was wholly outside of the property described in the assignment to Seth Hillman and consisted of the strip lying between the fence and the sheds aforesaid and was used by the occupants of each of said houses 225, 227 and 229 as the only outlet at the rear of their premises to said 14 feet alley for bringing in fuel and taking out refuse and for other purposes, and such use continued from that time, when said private alley was put into existence until obstructed by the defendants; that said house No. 227 has no cellar and its ground floor consists of a dining room and a kitchen; that in 1869 said houses Nos. 225, 227 and 229 were drained by sewer pipes running backward from each of said houses and emptying into one terra Cotta pipe at a point about 50 feet east of Third Street and thence by said pipe through the Eastern 50 feet of said Lots 12 and 13 now known as Lot 36 in Reservation 11, to a public sewer in said 35 foot alley which drainage continued until obstructed by the defendants on or about Sep-
tember 21, 1908, until which time there was no public sewer
18 in Third Street opposite said demised premises but after such obstruction a public sewer was placed there and the plumbing of said house 227 was connected therewith on October 6, 1908; that during the latter part of August, 1908, while said Lot 36 was being excavated for the construction of a building thereon, the said terra cotta sewer pipe was uncovered and the defendant Dr. C. B. Robinson complained to the plaintiffs that it was in his way and asked them to have it removed; that on September 19, 1908, the plaintiffs received from the defendant Mrs. Dora F. Robinson a letter as follows:

SEPTEMBER 19, 1908.

Mrs. A. Hillman, or Owner of 227 3d St. N. W., Washington, D. C.

DEAR MADAM: Some three weeks ago, through Mr. C. B. Robinson, I notified you that there is a terra cotta sewer, running from your property, lots 12 and 13 Res. 11, through my property, lot 36, Res. 11; that said sewer is broken and is a nuisance and in the way of the building which I am erecting and that you should at once remove the same.

You have paid no attention to this notice whatever and I now have to state that on Monday Sept. 21, I shall cut off and stop up this sewer, at the point where it enters my land.

Very respectfully,

DORA F. ROBINSON."

that on September 21, 1908 the defendant cut off said sewer connections and in consequence the plaintiffs had to remove their fur-

niture from the ground floor of their home No. 227 aforesaid and take their meals out, and take out the flooring and relay the same and make new plumbing connection at an expense of $394.54; that on August 14, 1908, the plaintiffs sent for the defendant Dr. Robinson and informed him that they had heard that he was going to put up a building on said Lot 36 that would encroach upon the plaintiffs and they requested him to inform them what he
19 intended to do about it; that during said conversation he said "My deed calls for a right of way over your 100 feet", to which the plaintiff replied; "Mr. Robinson, that is not possible; our deeds are deeds of forty years standing and give us the privilege of 100 feet to this private alley way"; that at different times Dr. Robinson placed lumber in the private alley way at the rear of the sheds but removed it in a gentlemanly way when they requested him to do so but in 1908, he erected over said private alley a building which is a permanent obstruction.

Thereupon Miss MYRA T. HILLMAN, one of the plaintiffs and produced and sworn as a witness on their behalf testified on cross-examination as follows: The said house No. 229 never was sold and never left the Gelston family. The first time we, the plaintiffs, heard of the purchase of said Lot 36 by Dr. or Mrs. Robinson, was in 1900, at the time when he put lumber in the private alley. On one occasion in 1900 when Dr. Robinson insisted on annoying us by not taking the lumber out of the private alley we had wood and coal brought into our premises by the front way, from Third Street. The rear of our shed was the limit of our 100 feet and the location or size of the shed was never changed from the year 1869 until Dr. Robinson changed it by taking off the rear 4 feet 10½ inches of the shed in September, 1908. The four houses on what is now Lot 36 and fronting on the 35 foot alley were built a year or so after we moved into the house 227 Third Street. The occupants of those four houses were tenants under Gelston, the lessor of
20 Wools, and who owned the property No. 227 Third Street, and their four gates in the fence at the rear of their houses opened into the same 4 foot private alley and they used it as a convenience of exit, in common with the Third Street houses Nos. 225, 227 and 229, to reach the 14 foot alley. No question was ever raised as to our right to use the 4 foot private alley until Dr. Robinson piled lumber in it in 1900. I then went to see Mrs. Robinson about the obstruction. The lumber was piled up in the private alley so that we could not get in or out that way. We are now using as a passageway between the back door of our shed and the 14 foot alley the passageway, about 4 feet wide, created by Dr. Robinson in taking off the rear part of our shed and the shed on each side of our shed. It is not quite as convenient as the former passageway was because we have to step up and down, because it is a little way below the foundation of our shed. Dr. Robinson called our attention to the terra cotta sewer pipe on August 22, 1908, where it was uncovered in excavating Lot 36. It was not to be seen anywhere in that lot except where he uncovered it. That was the first time I had

ever seen it. The point where the sewer pipes from the houses Nos. 225 and 229 joined the sewer pipe from our house No. 227 was under our shed. No repairs were ever made, to my knowledge at any time since 1869, on said sewer running through Lot 36, nor has any question ever been raised about the right of the occupants of the houses Nos. 229 and 227 to maintain a sewer in said Lot 36. The sewer was below the surface and could not be seen at any point until Dr. Robinson excavated. About August 20, or 22,
21 1908, I told Dr. Robinson to write to Lindsay and Sons of Baltimore concerning the private alley we are claiming and he came back and showed us the reply he received from them.

Upon redirect examination the witness, Miss Hillman, testified that the legacies given by the will of her mother Ann B. Hillman, to her two brothers have been paid.

Thereupon, two witnesses produced, sworn and examined on behalf of the plaintiffs testified that they were engaged in the real estate business in this District and that in their opinion the fair rental value of said house No. 227 with a rear exit to the public alley would be $40. per month but without such exit only $30. per month. Upon cross-examination the said two witnesses testified that in their opinion the rental value of said house would not be materially affected by cutting off the rear 4 feet of the sheds and substituting the present passageway formerly in use as stated by preceding witnesses and leading from the rear of said No. 227, to said 14 foot alley.

During the introduction of the foregoing testimony counsel for the respective parties exhibited to the jury the plat of actual surveys made on August 31, 1908, and November 17, 1909, by the Surveyor of the District of Columbia, and certified by him under the date March 24, 1910, showing the location of said house No. 227 and the shed in rear thereof, and of the 14 foot alley, the 35 foot alley, the lines of the demised premises and said Lot 36, the West wall of the building erected by the defendants on said Lot 36 and the present passageway at the rear of the shed aforesaid, which plat is hereinafter referred to in the testimony adduced on behalf of the defendants and is as follows:

(Here follows diagram marked page 22.)

23 And thereupon the plaintiffs rested.

Thereupon the defendants, to maintain the issues on their part joined, adduced evidence tending to prove that in a partition suit, in Equity No. 7113, lately pending in this court, by final decree filed June 21, 1881, the court allotted to Victor de L. Gelston, and decreed that he should hold in severalty and not jointly or in common with the other parties to the suit, all of said Lots 12 and 13

Defendants Exhibit No. 4

Form 947. E. D. 10-26-09 100.

SURVEYOR'S OFFICE, DISTRICT OF COLUMBIA,

Washington, MARCH 24 TH 1910

Plat of Survey OF PARTS OF LOTS 11 AND 12 AND LOT 36, RESERVATION 11.

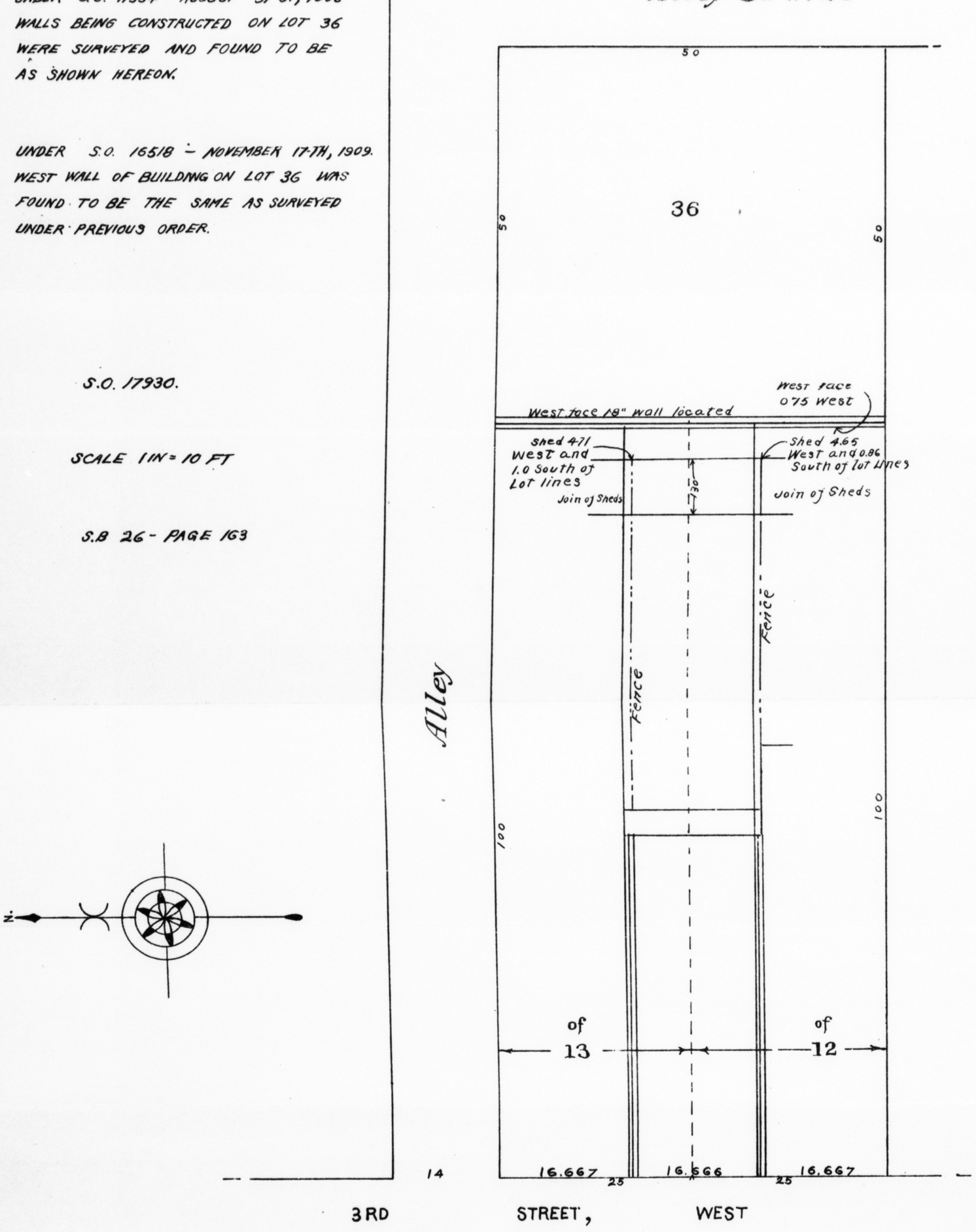
UNDER S.O. 11334 – AUGUST 31-ST, 1908 WALLS BEING CONSTRUCTED ON LOT 36 WERE SURVEYED AND FOUND TO BE AS SHOWN HEREON.

UNDER S.O. 16518 – NOVEMBER 17-TH, 1909. WEST WALL OF BUILDING ON LOT 36 WAS FOUND TO BE THE SAME AS SURVEYED UNDER PREVIOUS ORDER.

S.O. 17930.

SCALE 1 IN = 10 FT

S.B 26 - PAGE 163



I Hereby Certify, That the foregoing plot is correct in accordance with Law and Record. Act
survey made ~~this~~ as shown above ~~day~~ 19..., for B. F. ROBINSON.

M C Hazen
Surveyor, District of Colu

in Reservation 11 excepting only the two several parcels which by the said deed of lease dated July 20, 1868, and recorded in Liber 563, at folio 283, of said Land Records were secondly and thirdly demised by Hugh Gelston and wife to Edward Wools, the parts so excepted being the premises hereinbefore referred to as Nos. 225 and 227, the other parties to said suit being the children and widow of Edward H. Gelston who died October 16, 1878, Rebecca G., widow of Hugh Gelston having died December 17, 1879.

Thereupon the defendants offered in evidence a duly certified copy of a mortgage of leasehold from Edward Wools to Edward H. Gelston dated July 20, 1868 and duly recorded, whereby after reciting an agreement between the parties for a building loan of $3000. to be made by said Gelston to said Wools the said Wools mortgages the unexpired term of the leasehold interest created by the lease from said Gelston to said Wools hereinbefore set forth, in which mortgage the property, the leasehold interest in which is conveyed, is described as follows, "All those three (3) contiguous lots each having a front on the Easternmost side of Third Street of sixteen feet eight inches and extending back one hundred
24 feet and as described in separate descriptions as by reference may be seen in the aforesaid deed of lease by said Gelston to said Wools."

Counsel for plaintiffs then objected to such offer and stated as the ground of such objection that said instrument contained nothing material to this issue; whereupon counsel for defendants stated that the instrument was offered as evidence tending to prove that the three houses Nos. 225, 227 and 229 were built by Wools as lessee from Gelston and that no easements such as are now claimed by the plaintiffs then existed or were contemplated by said Wools or Gelston; but the court sustained the objection and excluded said instrument from the evidence to which ruling and action of the court the defendants, by counsel then and there duly excepted, which exception was then noted by the Justice in his minutes.

Next, the defendants, put in evidence the following:

Duly certified copy of deed from Edward Wools to Hugh Gelston dated January 11, 1870, and duly recorded, whereby the said Wools surrenders to said Gelston a lease-hold interest in a parcel of land described as follows: "Beginning on the Northernmost side of the whole lot and is bounded by a paved public alley fourteen feet wide and connecting Third Street with the street next adjoining on east side of it and has sixteen feet eight inches front and one hundred feet depth being a part or portion of the lot- numbered 12 and 13 of Reservation Eleven in plat containing and embracing Fifty feet front and one hundred feet in depth which by deed of lease
25 dated 20th day of July 1868 was leased by Hugh Gelston to said Edward Wools and recorded in Liber 563 folio 283 of the Land Records Washington, D. C. Together with the improvements thereon and the rights and appurtenances thereto belonging or appertaining."

Duly certified copy of the will of Victor D'L. Gelston dated the 7th day of February A. D. 1880 whereby after certtain specific de-

vises not affecting the property involved in this controversy, he devises all the rest and residue of his estate to his wife, Florence B. Gelston.

Duly certified copy of deed from Florence B. Gelston widow of Victor D'L. Gelston of Baltimore, Md. to Dora F. Robinson, dated December 30, 1898, and recorded December 31, 1898, among the records of the District of Columbia, whereby there is conveyed in fee simple to the grantee the following, "All those certain pieces or parcels of land and premises known and distinguished as and being parts of lots 12 and 13 in reservation 11, beginning at the Northeast corner of said lot 13 and running thence South on a public alley fifty feet to the southeast corner of said lot 12, thence West 50 feet, thence North fifty feet, and thence East fifty feet to the place of beginning, with the use of the alley located between the property now being described and the property fronting on Third street as now used and enjoyed, together with all the improvements, ways, easements, rights, privileges, appurtenances and hereditaments to the same belonging or in any wise appertaining."

Next, the defendants put in evidence a plat duly certified by the Surveyor of the District of Columbia of a subdivision made by the
defendant Dora F. Robinson, and recorded August 28, 1908,
26 in said Surveyor's Office combining the East 50 feet by full
width of Original Lots 12 and 13, Reservation 11, into Lot 36, being the same property conveyed to her by deed from Florence B. Gelston hereinbefore set forth, which plat is as follows:

(Here follows diagram marked page 27.)

28 Next, the defendants offered in evidence severally the following sections of the Plumbing Regulations duly made and promulgated by the Commissioners of the District of Columbia and in force in said District of Columbia during the year 1908, from July 1st to November 30th:

Section 11:

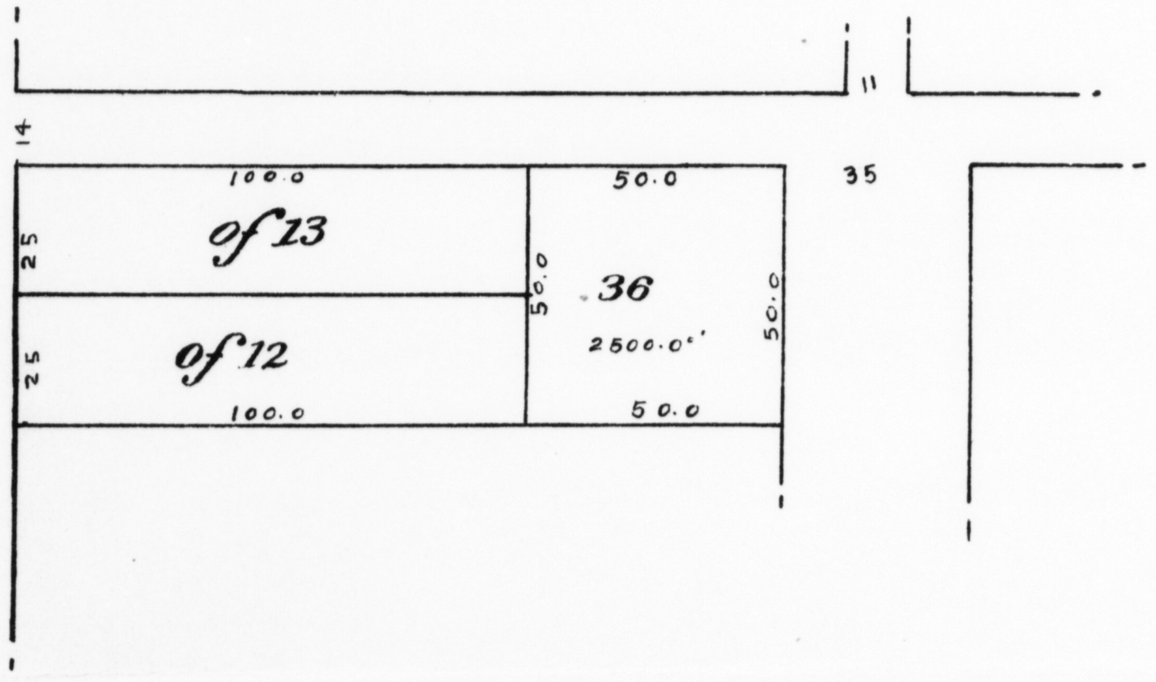
"No person shall run or cause to be run a water or sewer pipe through or from one lot or sublot, or from any structure thereon, into another separate lot or sublot, or structure thereon."

"Every water service pipe or house sewer must be run from the public street directly into the building, lot, premises, or establishment to be served."

"All houses in course of erection, as well as existing houses and premises abutting on public sewers and water mains provided by the Engineering Department of the District of Columbia, shall be connected therewith when, in the opinion of the Commissioners, such connection is necessary for the public health."

Defendant's Exhibit No 3

RES. 11



I hereby combine the east 50ft. by full width of original lot 12 and 13, Reservation 11, into lot 36 as shown above

Witness (signed) Erskine M. Sunderland.
(Signed) E. P. Wood

(Signed) Dora F Robinson (seal)

I certify that the foregoing plat is correct and agrees with the records of this office, and was received For record 1.12 P.M. August 28-th. 1908

Witness my hand and seal this 28-th day of August 1908

(Signed) M. C. Hazen (seal)
Surveyor. Dist. of Columbia

I cerlify that this is a true copy of the record as recorded in book 33, page 162.

W C Hazen
Surveyor. D.C.

50 1708.

A.J.

Scale: In - 30 ft

Section 61:

"If a building or premises is to be drained toward the side or front thereof, the house sewer shall be constructed in all cases from its junction with the public sewer to its terminus in the lot of extra heavy cast-iron pipe."

"If a building or premises is to be drained toward the rear thereof, a vitrified pipe sewer may be laid from the public sewer to a point twenty (20) feet from the wall of the building nearest to the public sewer, from which point to within the building the house
29 sewer shall be of iron pipe."

"Inside the building line the house sewer must be laid entirely within the limits of the lot proposed to be drained, and no vitrified pipe sewer may be laid within twenty (20) feet of the wall of any building."

"No building or addition shall be constructed over an existing terra cotta house sewer, but in each such case the house sewer shall be replaced with case iron within the limits of the proposed building and twenty (20) feet exterior thereto, in accordance with these regulations."

Section 64:

"No person shall connect or cause to be connected, the drainage system of any building, lot, premises, or establishment, otherwise than with that portion of the public sewer system intended for it, as shown by the records in the office of the sewer Division of the Engineer Department.

This restriction shall not prohibit the connection of a house sewer near the bench of a terminal manhole, at least the half of which is opposite to the premises to be served, if such connection be approved by the Superintendent of Sewers.

The permit Clerk will grant permission to connect with terra cotta pipe sewers. The connection with brick and concrete sewers will be permitted only upon the approval of the assistant to the engineer Commissioner in charge of the Sewer Division, Engineer Department, upon written application therefor.

Roof leaders and surface and ground water drains shall
30 not be connected to house sewers which discharge into public sewers intended for the carriage of sewerage only, except when special application made in advance is approved by the Engineer Commissioner; sub-surface drains for ground water only, build around or immediately adjacent to building foundation walls, may be connected direct to such public sewer, or to the house connection at such point, and in such manner as the Engineer Commissioner may designate, provided that this privilege will not be granted unless the owner signs a written agreement to disconnect such sub-surface drain, when directed so to do by the Commissioners of the District of Columbia."

Section 76:

"Where two dwellings are built upon the same lot, each shall have a separate house sewer, and neither dwelling shall drain under or through the premises or building of the other."

"If a soil stack and fixtures thereon are added to an existing system of plumbing connected with a public sewer otherwise than as required by Section- 11 and 64, and independent house sewer shall be provided for the premises in accordance with the requirements of those sections."

Section 129:

"Whenever a house sewer or drain is obstructed with tree roots or is found broken or defective so that sewage or drainage escapes therefrom into the surrounding soil or into adjacent premises the Inspector of Plumbing shall condemn such sewer and order its repair or replacement."

"If the defective sewer be of terra cotta he may direct its replacement with cast-iron to an extent conformable to the provis-
31 ions of Section 61, or to a less extent, at his discretion."

"Whenever a pipe, plumbing fixture or appurtenance of a system of plumbing is broken, defective or inoperative, its repair or replacement may be ordered by the Inspector of Plumbing, with the approval of the officer in charge of the Division of Sewers and Plumbing."

"Any order or notice issued under the provisions of this section shall be promptly complied with by the person responsible."

To which offer and to the admission of said sections and each of them, separately, in evidence, counsel for plaintiffs then objected, and the court sustained the objection as to each of said sections separately and excluded the same from the evidence, to which ruling and action of the court as to each of said sections separately the defendants by counsel then and there duly and separately excepted, which exceptions were then severally noted by the Justice in his minutes.

Next, the defendants put in evidence the plat, herein-before referred to, of actual Surveys made on August 31, 1908, and November 17, 1909, showing the centre of an 18 inch wall to be on the West line of said Lot 36, which wall is the West wall of the building constructed on said Lot 36 during the Summer of 1908.

Next, the defendant C. BARNWELL ROBINSON produced, sworn and examined as a witness on behalf of the defendants, testified as follows: The defendant Dora F. Robinson is my wife. The property now known as Lot 36, in Reservation 11, and so designated in the testimony in this case, was put up at auction and I bought it.
32 I made a cash deposit. I took steps to ascertain whether or not any other persons than those who were selling the property had any rights or interest in it. I had the conveyance made to my wife by the deed which is in evidence at this trial. On the East part of the property, fronting on the 35 foot alley were the remains of four brick houses. There was only one tenant in them. The Health Department had ordered them to be abandoned. I received the deed and paid for it December 31, 1898. It took about a month to get the papers. I got possession under the deed January, 1899. I had been living near by there since 1891. The property

was a nuisance. I had previously tried to purchase and got possession of it so as to control it. The houses were wrecked and being used as a lodging by tramps. After I had the property two weeks the Health Department notified me that I must clean up the property and remove the filth and ashes accumulated on it. Ashes were piled up all along and decayed lumber was lying all over it. After removing the debris we reconstructed the four houses. The ashes were piled up against the sheds at the back of the houses Nos. 225, 227 and 229 Third Street so that the occupants of those houses could not get out of the back of their property at that time. They were completely blocked up. We had something like 30 loads of ashes taken out of this particular place. That condition had existed ever since I moved there in 1891. We considered the condition there a manace to our other property near by. No efforts were made by any one since 1891 to remove the ashes or to clear up the property.
33 At the rear and on the 14 foot alley there were no fences; only a few posts here and there. After cleaning up we rebuilt the houses, put up fences dividing the lots and a fence along the 14 foot alley and another across the rear, near the sheds of the Third Street houses leaving a passage way for the new tenants in passing out from their back yards to the 14 foot alley and at the North end of the passage way we built a gate to make it private and keep out the rabble. Then I put new tenants in. About a year later I was compelled to sewer the property and put in water closets with running water. I made the street sewer connection in the 35 foot alley, each house being separately sewered. I knew nothing of the terra-cotta sewer mentioned in this trial until about the 20th day of August, 1908. I had a veterinary hospital fronting 222 C Street with the rear opening on the 14 foot alley opposite this property. The passage way at the rear of the sheds was about 5 feet wide, and we tied horses in it and piled in it lumber and anything that was in our way in the hospital. That continued until 1900 without any question from anyone, no one else using the passage way except my tenants. In 1900 the plaintiff Miss Hillman told me her mother was sick and she wanted to get in some coal that way. I then had the lumber which had been standing there two or three years and which obstructed the back doors of the shed- so that people could not get in or out there, shifted to the other side of the passageway, which blocked the gates of my tenants, and after she got her coal in I had the lumber put back. It remained there a month or two,
34 until it was consumed by the tenants. My conversation with Miss Hillman was in October, 1900. That was the first time I ever saw her and I did not see her again until 1908, when we were about to build. She and the plaintiff Miss Clement were looking out of the back shed door. Miss Hillman beckoned to me and asked me what we were going to do. I told her that we were about to erect a building and that according to the survey our lot came up under their shed so that the water ran off the shed upon our lot and it would be necessary to take out the back of the sheds during the construction. I asked her where she wanted the shed moved. She said she did not own the property and did not know anything

about it or what to do; that I should see the owners. She gave me the address of Lindsay and Son of Baltimore and asked me to correspond with them in reference to where their outlet should be located, which I did. I corresponded with Lindsay and Son and asked them where I should locate the new passage way to allow them to get out. The conversation with Miss Hillman was merely in reference to the removal of the shed and the distance she wanted it put back, how wide an alley she wanted there and whether she wanted down spouts and how they were going to carry the water off. This was about the 17th or 18th of August, 1908, three or four days after we had started work removing the old buildings and debris. On August 22, I took to Miss Hillman and Miss Clement the reply I received from Lindsay and Son and read it to them. The letter is as follows:

"BALTIMORE, *August* 22*d*, 1908.

Mr. C. Barnwell Robinson, 222 C Street N. W., Washington, D. C.

35 DEAR SIR: Yours of the 20th inst. received. We represent the owner of ground rents on Nos. 225 and 227 Third St., in your city. The owner of the leasehold of No. 225 is Mrs. Cath. Higgs, and of No. 227 is Mrs. A. B. Hillman. It seems to us that an examination of the various titles should disclose the dimensions of the lots and the location of the alley.

Yours very truly,

GEO. W. LINDSAY & SONS."

(Witness resuming:) After the letter was read to them Miss Hillman said they did not have any money to move the sheds and they could not afford to move them; that they did not own the property and they had nothing at all to do with it; that it was between Lindsay & Son and myself. Nothing was said at or before that time as to the right of way mentioned in the deed to Mrs. Robinson. They did not object to my cutting off the shed. I then ascertained what an examination of the titles disclosed about the location of the private alley and that the only record mentioned of any alley was in the deed to Mrs. Robinson. I then proceeded with the work of excavating preparatory to the construction of the building on Lot 36. In the progress of the work the sewer was struck and first disclosed about the 23d or 24th of August, 1908. I sent word by a servant to Miss Hillman that we had found a sewer coming out of what seemed to be her property. We did not cut it or block it for about a month after that. It ran easterly
36 through lot 36 near the center line of the lot. There is a large sewer 3 feet in diameter, running down the 14 foot alley and then turns down the 35 foot alley. When I remodeled the four houses they had me tap the sewer in four places making separate connections for each house. The terra cotta sewer was about six feet below the surface of Lot 36. It was not necessary to block it until after the walls of the building were up. Until we first disclosed it I had no knowledge, notice, suspicion, or reason to believe that a sewer ran through said Lot 36. I had not the slightest idea of it. In excavating for the West wall the earth,

being wet, continued to cave in on us so that we thought there was a spring on the west side of the bank at the excavation for the West wall. We had no idea there was a sewer there. The caving-in finally exposed the terra cotta sewer which ran from the Hillman property into Lot 36 and was first exposed not over three feet under ground under the rear of the shed, under what is now the private passageway, West of our West wall. Where so exposed it dropped. That moisture came out of the terra cotta sewer at a point on the Hillman lot. We uncovered the sewer at several places in our Lot and at each of those places it was leaking. It was composed of sections, each three feet in length. These sections were open joints, without putty, cement or anything of the kind; nothing to hold the joints tight. The building we put upon Lot 36 is of brick, five stories high and covers the whole of Lot 36. It cost me about $30,000. I cut off the rear of the sheds when the walls were up about 20 feet. When the West wall was put up about six
37 feet a heavy rain caused the wall to fall and a cave-in of the bank exposed a brick walk which extended from the 14 foot alley through the old passageway from No. 225. It ran along under the rear of the sheds just West of our West wall. The bricks were laid in "herring bone fashion." They were not like the bricks we make today. This old walk was located wholly outside of lot 36. I received a letter from Mr. Eugene A. Jones, dated November 14, 1908, stating that he had been retained by plaintiffs to bring suit against me to recover the possession of the rear portion of their property now occupied in part by your wall and alley and to recover damages for obstructing their right of way, and disconnecting their sewer." On that date the sheds were in their original condition excepting as to the rear being cut off leaving a four foot passageway for them to go in and out and our building was under roof. The sheds for Nos. 225, 227 and 229 were one continuous structure from the south line of Lot 12 to the 14 foot alley. In the partition between the shed for 225 and the shed for 227 a board had the remains of hinges indicating that in the past a door was there right at the edge of the south end of the old brick pavement.

Upon cross examination the said witness further testified as follows: In 1898, when I bought Lot 36, the private alley at the rear of the sheds was so obstructed with the ashes piled up against all the back gates in the sheds that the alley was not being used at all. That private alley was then being used principally by crap-shooters. About 4 years ago I put a cement floor in my stable. Before that I had to replace the board flooring from time to time and I
38 put the old material in the private alley and allowed the colored tenants on Lot 36, to use it. There was a constant removal in this way, of old material from the stable. When I got the deed to Mrs. Robinson for Lot 36, there was no alley way there. I read the deed and then measured with a tape line and found 150 feet in the Square and knowing the other property was owned by the Gelston Family I thought they had a right to give me the use of an alley alongside of this property in the deed. I had the title to the property Lot 36 examined. There was no record of an

alley up to my deed. The examination was made and certified by The Real Estate Title Insurance Company December 14, 1898, and by The District Title Insurance Company January 16, 1898. I now hand to you these certificates. Neither of them shows any reference to a right of way or easement as to a passage way or sewer through, in, or upon Lot 36 No. 229 Third Street is owned by Mrs. Gelston; that the sheds in question were composed of rough pine boards, not painted; that the frame work, posts and rafters, was not over 18 years old and the other parts of later date; that after cutting off the rear 4 feet Dr. Robinson had the backs put up again better than they were before with doors therein opening upon the now existing passageway between the sheds and the west wall on the line of Lot 36; that the terra cotta sewer at a point about 5 feet West of said West wall ran downward, vertically, to a point about 7 or 8 feet below the surface and thence, at that level, through Lot 36; that when the sewer was first uncovered a workman accidentally broke into it with a pick; that water and other matter was
39 flowing through it until the defendants caused it to be plugged at a point west of the west line of Lot 36; that the bricks in the pavement found under the sheds were travel worn and that such wear had continued for thirty years or more; that when so discovered, the said brick pavement was covered by ashes and refuse in a layer about four to six or eight inches deep; that the bricks were narrower and thinner than the bricks made nowadays; that after the wall fell and the rear of the shed, which overhung the wall, had been cut off, a lady came out of the middle house, No. 227, and told the foreman employed by the defendants in the construction work, that she lived in that house, No. 227, and that she was going to get a carpenter to fix the rear of the shed but did not object to anything the foreman was doing.

Thereupon, THOMAS G. MUIR, a witness produced, sworn and examined on behalf of defendants testified as follows: I am foreman for Knox Express, on the mechanical part, and have been engaged ever since 1878 in the performance of my duties on the side of the 35 foot alley opposite to the building erected by the defendants. I was there every day except Sundays. I came in from Third Street by the 14 foot alley during 1878 and 1879. The private passageway at the rear of the houses Nos. 225, 227 and 229 Third Street was paved with brick at that time and since. That alley was about 4 feet wide and ran along and west of a low fence located where the West wall of the Robinson building now stands. There was then a lot of ashes and dirt on it. The only time I have seen the pavement recently was when the west wall of Dr. Robinson's house caved in. Part of the pavement caved in with the wall.
40 It was right in the same location where I had seen it years ago. There were no sheds there in 1878 or in 1879. I am not sure about 1880. I do not think the sheds were there more than about 10 or 12 years ago. During the last 12 years I traveled in the 14 foot alley about once a week. There was always a little passageway between the rear of the four alley houses and the three Third Street houses.

Thereupon CHARLES C. BEVERIDGE, a witness produced, sworn and examined on behalf of the defendants, testified as follows: I was born March 12, 1857. From 1867 until December 1870 or 1871 I lived at No. 218 C Street. The back of our premises there opened out upon the 14 foot alley on the side opposite to the private passageway mentioned in this trial. During the past 38 years I have been living at No. 224 Third Street Northwest, just opposite the house of the plaintiffs, No. 227. That and the adjoining houses were built about 1869 or 1870. When they were built they had no back sheds. There was not a shed then on either side of the 14 foot alley. The said Third Street houses then had a fence at the back of their lots and back of that was a vacant lot. The verterinary College known as Robinson's Hall built by the defendants in 1908, now occupies that vacant lot. Between that and the 3d street houses was a private alley way, about 4 feet wide, with a fence on each side about 4 or 5 feet high. I frequently played in that little alley. Goldstein, who occupied No. 229 Third Street kept his coal in a box up near the house. I do not know when the sheds were erected, but they were not there in 1869 or in 1870.

Thereupon, WILLIAM ANDERSON, a witness produced,
41 sworn and examined on behalf of the defendants, testified as follows: When I was 6 or 7 years of age, early in the eighties, I lived at No. 216 C Street Northwest. The rear of those premises was near the 14 foot alley mentioned in this case. We lived there six years. I played in the 14 foot alley all the time. I remember the private alley which ran South from the 14 foot alley across the rear of the houses Nos. 225, 227 and 229 Third Street. It was about 3½ feet wide. On each side of it was a low fence which I could get over at any time. There were no sheds West of that private alley, to the best of my recollection. I never saw those sheds until the other day. The little private alley was used by the colored tenants of the 4 houses as a passageway and they threw their wash water into it. I moved from that neighborhood in 1886 or 1887. There were no sheds on that private alley at that time.

Thereupon, HATTIE STEWART (of Color), a witness produced, sworn and examined on behalf of the defendants, testified as follows: I have seen the big building erected by Dr. Robinson in Reservation 11 fronting on the 35 foot alley. I lived 15 years in one of the houses formerly on that site. It was the house on the corner of the 35 foot alley and the 14 foot alley. I was the first one that ever lived in it. It was a new house. I remember the three houses fronting on Third street back of where I lived. Mrs. Hillman lived in one of them. I worked for her. Those Third Street houses then had no sheds back of them. Between their back lot and ours
42 was a little alley just big enough for a person to walk through. It was then paved; a brick pavement and it was there when I left but no sheds were there then.

Thereupon EMMA A. HALL (of color) a witness produced, sworn and examined on behalf of the defendants, testified as follows: I was born in one of the brick houses fronting on the 35 foot alley where Dr. Robinson's big building was erected about two years ago. They were then new houses. I lived there 32 years. I am going on 44 years old now. We went out the rear of our back lot into a little alley way that was paved with brick and ran to the 14 foot alley and had a fence on each side of it. There were no sheds there. The Third Street houses had no sheds. I remember when the sheds were put up but I couldn't tell you the date. The people in the alley houses used the little alley like the other people on Third Street. I knew the Hillmans who lived in one of the Third Street Houses, and I toted water for them. I was pretty old when the sheds were built. I might have been older than 12. The sheds were built right up to the brick pavements.

Thereupon JOSEPH D. ROBINSON, a witness produced, sworn and examined on behalf of the defendants, testified as follows: I am a son of the defendants. While my father was putting up the building mentioned in this trial, in August or September, 1908, I took a letter from my mother to Miss Hillman, one of the plaintiffs and I handed it to her. She read it and then rose and said "I know nothing of this sewer. It don't belong to me. If you wish the sewer fixed you will have to fix it yourself." That was the exact expression. I said we didn't have anything whatever to do with
43 the sewer, we didn't care about its being fixed; that we wanted it removed. I then came away. There was nothing else said.

Next, the defendants adduced evidence tending to prove that when they purchased the property, Lot 36, they did not know that any one used the little passageway except the colored tenants of the alley houses; that the first notice they had that the plaintiffs used it was when Miss Hillman complained two years later, as to the lumber obstructing it;

Thereupon the defendants rested.

Thereupon, the parties by their respective counsel stated to the court that they had no further testimony to offer, and the foregoing was all the evidence in the case.

Thereupon, the defendants, by counsel moved the court, upon the whole case, to instruct the jury to return a verdict for the defendants but the court overruled said motion and refused to so instruct the jury, to which ruling and action of the court the defendants, by counsel, then and there excepted, which exception was then duly noted by the Justice *is* his minutes.

And next the plaintiffs, by counsel, moved the court to instruct the jury as follows:

1. The jury are instructed, that if they find from the evidence, that at the time of the partition deeds between the heirs and devisees of Hugh Gelston, the plaintiffs or those under whom they claim, were and had been continuously using and enjoying the certain

right of way mentioned in the declaration, and that said right of way was visibly established and was reasonably necessary for the enjoyment of said property and that the use thereof was
44 continued by the plaintiffs or those under whom they claim, until obstructed, and was never voluntarily abandoned, and that the defendants or either of them destroyed or obstructed the same, the plaintiffs are entitled to a verdict.

To which motion and instruction the defendants by counsel then objected but the court overruled the objection and granted said instruction, to which ruling and action of the court the defendants by counsel then and there duly excepted, which exception was then duly noted by the Justice in his minutes.

And next the plaintiffs, by counsel, moved the court to further instruct the jury as follows:

4. If the jury find for the plaintiffs on the second count of the declaration, they may find in addition to the reasonable expenses of the plaintiffs in making changes and repairs to the property rendered necessary by the obstruction of the drains and pipes, such additional amount as will compensate them for the diminished value of the use and occupation of the premises by reason of the inconvenience and annoyance of excavations in the basement, and the unwholesome and disagreeable sights and smells occasioned thereby, if any.

To which motion and instruction the defendants by counsel then objected but the court overruled the objection and granted said instruction to which ruling of the Court the defendants by counsel then and there duly excepted which exception was then duly noted by the Justice in his minutes.

And next the plaintiffs by counsel, moved the court to
45 further instruct the jury as follows:

7. The jury are instructed that if they find from the evidence that at the time of the execution and delivery of the partition deeds between the heirs and devisees of Hugh Gelston, the property known as House No. 227 Third Street Northwest, enjoyed and possessed the right of drainage and sewerage through pipes running through the property now claimed by the defendants, and that the use thereof had been continuous and that such use was known to exist by the parties to said partition deeds at the time of the execution and delivery thereof, and that the use thereof was continued by the plaintiffs or those under whom they claim, until obstructed and was never voluntarily abandoned and that the defendants or either of them destroyed or obstructed the same, the plaintif-s are entitled to a verdict.

To which motion and instruction the defendants by counsel then objected but the court overruled the objection and granted said instruction to which ruling and action of the court the defendants by counsel then and there duly excepted, which exception was then duly noted by the Justice in his minutes.

And next the plaintiffs, by counsel, moved the court to further instruct the jury as follows:

8. The jury are instructed that Florence B. Gelston, the grantor

in the deed under which the defendants claim, could convey no greater or better title to the lands described in said deed than she had at the time of the conveyance, and that if the title to the said land was burdened with the easements of the right of
46 way and drainage described in the declaration, at the time of said conveyance, the defendants took title thereto, subject to said easements.

To which motion and instruction the defendants, by counsel then objected but the court overruled the objection and granted said instruction to which ruling and action of the court the defendants by counsel then and there duly excepted which exception was then duly noted by the Justice in his minutes.

And next the plaintiffs, by counsel, moved the court to further instruct the jury as follows:

10. The jury are instructed that if they find for the plaintiffs on the first count, and they further find from the evidence that the obstruction of the right of way complained of is permanent in its character, that the measure of damages for the loss of said right of way is the difference between the value of the use and occupation of said property with the right of way and its value without the right of way; and that in estimating the amount of damage arising by reason of the loss of said right of way, they may take into consideration the annual rental value of said property with the right of way and the annual rental value of said property without the right of way.

To which motion and instruction the defendants by counsel objected but the court overruled the objection and granted said instruction to which ruling and action of the court the defendants by counsel then and there duly excepted which exception was then duly noted by the Justice in his minutes.

And next the plaintiffs, by counsel, moved the court to further instruct the jury as follows:

47 12. The jury are instructed that if they shall find from the evidence that during any portion of the time from the closing of the 4 ft. alley, mentioned in the declaration, to the present time, the plaintiffs have made use of an outlet over the rear portion of the property on Third Street adjoining on the North, that then they are not entitled to recover any damages for the obstruction of said 4 ft. alley between said periods, but the jury are further instructed that unless they shall find from the evidence that the plaintiffs have a legal right to use the exit now existing over the rear 4 ft. of the adjoining property on Third Street, and can make use of said exit without committing a trespass upon the owner of said adjoining property, then in that event, in estimating the damages to accrue to the plaintiffs for the permanent obstruction of said 4 ft. alley, they cannot take into consideration as mitigation of damages, the existence of an outlet which plaintiffs cannot use without the commission of a trespass upon the property of an adjoining owner.

To which motion and instruction the defendants, by counsel then objected but the court overruled the objection and granted

said instruction to which ruling and action of the court the defendants by counsel then and there duly excepted, which exception was then duly noted by the Justice in his minutes.

Thereupon, the defendants by counsel moved the court to instruct the jury as follows:

5. If you believe upon the evidence that the sewer mentioned in the second count was constructed for temporary use or
48 that it was not then intended for permanent use your verdict must be for the defendants on the second count.

Which said motion was granted by the court and the jury were instructed accordingly.

Thereupon, the defendants by counsel moved the court to further instruct the jury as follows:

6. If you believe upon the evidence that during or about the year 1900 the defendants or either of them took possession of the passageway mentioned in the first count and obstructed the use thereof by Mrs. Ann B. Hillman and asserted title thereto and denied her right to the use thereof and that then or afterward her daughters, the plaintiffs, on her behalf or acting for themselves, or that either of them acting on behalf of herself or of her mother acquiesced in such assertion of title and denial of right, and that afterward in 1908, the defendants by the construction of the building mentioned in the evidenced permanently closed said passageway, without clear and unequivocal notice to them of some lawful claim on the part of the plaintiffs of a right to the use by them of said passageway, your verdict must be for the defendants on the first count.

Which said motion was granted by the court and the jury were instructed accordingly.

Thereupon, the defendants by counsel moved the court to further instruct the jury as follows:

9. Unless you find upon the evidence that the sewer mentioned in the second count was constructed with the knowledge of the
49 then owner or owners of said Lot 36, or that such owner or owners at some time had notice of its existence or of facts reasonably sufficient to put such owner or owners upon inquiry concerning its existence, your verdict must be for the defendants on the second count.

Which said motion was granted by the court and the jury was instructed accordingly.

Thereupon, the defendants by counsel moved the court to further instruct the jury as follows:

11. Upon each count of the declaration the burden is upon the plaintiffs to establish their case by a preponderance of evidence, and upon any claim by the plaintiffs in this case upon which you fail to find the weight of evidence in their favor your finding should be for the defendants.

Which said motion was granted by the court and the jury was instructed accordingly.

Thereupon, the defendants by counsel moved the court to further instruct the jury as follows:

12. Unless you find upon the evidence that the passageway used

in 1876 at the time of the partition deeds mentioned in the evidence was located in the same place and over the same ground as the passageway mentioned in the first count of the declaration then your verdict must be for the defendants on the first count.

Which said motion was granted by the court and the jury was instructed accordingly.

Thereupon, the defendants by counsel moved the court to further instruct the jury as follows:

13. If you find upon the evidence that the passageway
50 mentioned in the first count of the declaration was not located in the place mentioned as its location in the first count of the declaration until sometime after the date of the partition deeds made in 1876, mentioned in the evidence, then your verdict must be for the defendants on the first count of the declaration.

Which said motion was granted by the court and the jury were instructed accordingly.

Thereupon the defendants by counsel moved the court to further instruct the jury as follows:

14. You will consider all the evidence in the case but you are not bound by any of it which you do not believe to be true and you will give to the testimony of each witness such weight, if any, as you believe it deserves and in this you should act upon your best judgment and your knowledge of men and women and your own experience and observation in the ordinary affairs of life, taking into consideration whether or not upon the evidence or the demeanor of the witness while testifying the witness is biased by reason of interest in the suit or friendly or unfriendly relations to the parties to the suit, or any of them, and whether or not the testimony of the witness is reasonable and consistent, and applying also such other test or tests as to the truth of the testimony as your own personal knowledge and experience in the ordinary affairs of life may suggest.

Which said motion was granted by the court and the jury was instructed accordingly.

Thereupon the defendants by counsel moved the court to
51 further instruct the jury as follows:

15. If you find for the defendants upon both counts you will return a single verdict in favor of the defendants. If you find for the plaintiffs on both counts or upon either count of their declaration you will return a separate verdict upon each count.

Which said motion was granted by the court and the jury was instructed accordingly.

Next, the defendants by counsel moved the court to instruct the jury as follows:

1. If you believe upon the evidence that the use of the passageway in question was commenced by said Wools or some of his successors in title as to premises No. 227 3rd Street with the consent of the owner of said Lot 36 and that such use was so commenced without any claim of right on the part of such user adverse to the rights of said owner such use so commenced will not entitle the plaintiffs to a recovery on the first count.

But the court upon the objection of counsel for plaintiffs over-

ruled said motion and refused to so instruct the jury to which ruling and action of the court, the defendants by counsel then and there duly excepted, which exception was then duly noted by the Justice in his minutes.

Next, the defendants by counsel moved the court to further instruct the jury as follows:

2. If you believe upon the evidence that the use of said passageway was commenced by said Wools or some of his said successors in title under a claim consistent with or in subordination to the title of the owner of Lot 36, nothing but a clear, unequivocal and
52 notorious disclaimer of the title or right of such owner will render such use adverse.

But the court upon the objection of counsel for plaintiffs overruled said motion and refused so to instruct the jury, to which ruling and action of the court, the defendants by counsel then and there duly excepted, which exception was then duly noted by the Justice in his minutes.

Next, the defendants by counsel moved the court to further instruct the jury as follows:

3. If you believe upon the evidence that when the parcel of land now constituting Lot 36 aforesaid was purchased by and conveyed to the defendant Mrs. Robinson neither she nor her husband knew or had cause to suspect that sewerage from the plaintiffs' premises flowed through said Lot 36, your verdict must be for the defendants on the second count.

But the court upon the objection of counsel for plaintiffs overruled said motion and refused so to instruct the jury, to which ruling and action by the court the defendants by counsel then and there duly excepted, which exception was then duly noted by the Justice in his minutes.

Next, the defendants by counsel moved the court to further instruct the jury as follows:

4. Unless you find upon the evidence that during a continuous period of not less than twenty years one or more of the successive tenants of the premises No. 227 3d St., N. W., under the lease of July 20, 1868, from Hugh Gelston and wife to Edward Wools, had adverse, actual, exclusive, open and notorious use of the passageway mentioned in the first count of the declaration and that such use was at all times during said period hostile or injurious to the
53 owner for the time being of the parcel of land referred to in the evidence as Lot 36, Reservation 11, you must find for the defendants on the first count; and unless you find such use of the sewer mentioned in the second count of the declaration for twenty years continuously by one or more of the said successive tenants you must find for the defendants on the second count. And if you believe upon the evidence that the use was commenced by the consent, permission or acquiescence, express or implied, of the owner at that time of the parcel of land now constituting Lot 36 aforesaid such use cannot be considered adverse and in that event your verdict will be for the defendants, unless you further believe upon all the evidence that after such commencement the plaintiffs or some of

those under whom they claim as aforesaid set up a claim to such use as matter of right and that the owner of said Lot 36 had notice of such claim of right and that such adverse use continued for twenty years from and after such notice.

But the court upon the objection of counsel for plaintiffs overruled said motion and refused so to instruct the jury, to which ruling and action by the court the defendants by counsel then and there duly excepted, which exception was then duly noted by the Justice in his minutes.

Next the defendants by counsel moved the court to instruct the jury as follows:

7. Unless you believe upon the evidence that in 1876, at the time of the partition deeds mentioned in the evidence the passageway mentioned in the first count was being used by Mrs. Ann B. Hillman, then tenant of premises No. 227 Third Street, N. W.,
54 under a claim of right by her to such use and that such use and claim of right were then known to the parties named in said deeds, your verdict must be for the defendants on the first count.

But the court upon the objection of counsel for plaintiffs overruled said motion and refused so to instruct the jury, to which ruling and action by the court the defendants by counsel then and there duly excepted, which exception was then duly noted by the Justice in his minutes.

Next, the defendants by counsel moved the court to instruct the jury as follows:

8. Unless you believe upon the evidence that in 1876, at the time of the partition deeds mentioned in the evidence, the sewer mentioned in the second count was being used by Mrs. Ann B. Hillman, then tenant of premises No. 227 Third Street Northwest under a claim of right by her to such use and that such use and claim of right were then known to the parties named in said deeds, your verdict must be for the defendants on the second count.

But the court upon the objection of counsel for plaintiffs overruled said motion and refused so to instruct the jury, to which ruling and action by the court the defendants by counsel then and there duly excepted, which exception was then duly noted by the Justice in his minutes.

Next, the defendants by counsel moved the court to instruct the jury as follows:

10. Unless you believe upon the evidence that at some time before the uncovering in 1908, of the sewer mentioned in the second count, as shown in the evidence, the plaintiffs or their mother Mrs.
55 Ann B. Hillman, or that in 1876, the parties to the partition deeds mentioned in the evidence, knew that said sewer ran through or into said Lot 36, your verdict must be for the defendants on the second count.

But the court upon the objection of counsel for plaintiffs overruled said motion and refused so to instruct the jury, to which ruling and action by the court the defendants by counsel then and

there duly excepted, which exception was then duly noted by the Justice in his minutes.

And thereupon the court charged the jury as follows:

"Gentlemen of the jury, you will find it advantageous to the determination of this case to understand and bear in mind the difference between a leasehold and an estate in fee simple. The owner of the leasehold possesses only the right to use the property demised by the lease, while the ultimate ownership of the fee rmains in another person. The time during which the lease is to continue is of no consequence, of itself. No matter how long the lease may be, even for 99 years and renewable forever, nevertheless, it only conveys the right to the use of the property described by the lease while the fee, the ultimate ownership, remains outstanding in another person.

Reflect for a moment upon the extent to which the absolute owner of real estate, one who is in possession of it, may dispose of its various parts.

As an illustration of the claim which the plaintiff makes in this case, I assume, only for the sake of illustration the following:

Carry your minds back to the time when Gelston owned this entire tract from 3d street to the 35 foot alley, when
56 he owned both the property that is now under lease to the plaintiffs and when he owned the lot which the defendant, Dr. Robinson, now possesses. If, while Gelston owned that property in fee simple, he built buildings on it, and devoted any part of his property to the advantage of one of those buildings, by establishing in connection with the building a sewer pipe that drained across the other part of his property, or established in connection with one of his buildings an alley way that led across another part of his property—if he did that with the idea of making either the sewer or the alley way a thing which pertained to the particular house with which it was connected, then he made it so attached to that house as that it became an appurtenance to it, and encumbered that other part of his property in which was the alley and over which it extended.

It is on that theory, and only that theory, that the plaintiff appears before you. The plaintiff is not here claiming any right which has grown up by use over a long period of time. That is not the claim of the plaintiff.

The plaintiff claims, and claims only—and it is only upon that theory if you find that claim to be established by the evidence that she can recover—that at the time this entire tract was owned by a single owner, either that he built this sewer himself and established the alley himself, or somebody else did it with his approval and consent, and he, at the time, intended that the alley or sewer should become a thing which should permanently pertain to this house No. 227 3d Street.

If either one, if either the alley or the sewer, was es-
57 tablished as a thing that was intended by the then owner of the fee to permanently pertain to house No. 227 3d Street, then it became appurtenant to it, and when the owners in fee, in the partition proceedings, conveyed 227 3d Street with the appur-

tenances it would be that clause of the deed which carried those things which did pertain and which only could pertain on the theory I have already pointed out and emphasized—that is, that at the time the property was actually owned by one owner the alley or sewer was established either by him or by somebody else with his knowledge, and with his intent that they should permanently attach to this house 227 3d St.

So you will have to look back over the evidence to ascertain whether the plaintiff has proven that by a preponderance of the evidence, with respect to either alley or the sewer. If she has, she has made out a right to recover. If she has not, there is no theory upon which she can recover.

When you are examining the question whether or not the alley which was impeded or barricaded and built over by Dr. Robinson, was the alley which was established by the owner of the fee before the partition, it is of course important for you to decide on which side of the land that alley, if there was originally an alley there, was established. If it was established by the original owner on the Third street side of the land, and then Dr. Robinson put a building on the 35 foot alley side of the land, he has not interfered with the alley which was originally established on the 3d street side.

58 But if the alley was originally established by the owner on Dr. Robinson's side of the land, then of course he has interfered with that alley by building over it.

Those are the primary considerations to be considered in determining the ultimate question, whether the plaintiff has proven a right to recover. If she has proven a right to recover with respect to the alley it then becomes of importance to understand the nature of a leasehold estate, because you will have to adopt that measure of damages which is appropriate for injuries done to a leasehold as distinguished from injuries done to a fee simple estate.

Inasmuch as a leasehold only gives a right to use and enjoy the property, the measure of her damage would be the difference between the value of the use of the property 227 3d street with the rear alley and without the rear alley, and the difference between the value of the property with the alley and without the alley would be the measure of her damage with respect to the alley.

With respect to the measure of her damage concerning the sewer, you recollect that the evidence shows that she has established another sewer. In other words, she has put the property in as good condition as it was before that sewer was stopped up, by building a new one. Therefore, with respect to that particular item, the measure of her damage would be the reasonable expense that she was put to in order to restore the property, after the sewer was obstructed by the defendant.

You may take your exceptions.

Mr. BAILEY (of counsel for defendants): Of course your
59 Honor understands that all of our exceptions as to the prayers stand and we do not have to renew them at this time?

The COURT: No. You may retire, gentlemen.

And thereupon by direction of said Justice the jury retired to

consider of their verdict and thereafter on the same day, the 11th day of April, A. D. 1910, the jury returned a verdict for the plaintiffs upon each count; upon which verdict judgment for the plaintiffs was entered on the 21st day of April, A. D. 1910, and thereafter the defendants by their attorneys duly presented and submitted the foregoing bill of exceptions and prayed the court to settle and sign the same and cause the same to be entered of record, which is accordingly done nunc pro tunc this 19th day of July A. D. 1910.

DAN THEW WRIGHT, *Justice.*

The plaintiffs will take notice that at 10 o'clock A. M. on the third day of June A. D. 1910, or as soon thereafter as counsel may be heard, the defendants will present to the court and move the court to settle, sign and enter of record, a bill of exceptions in the above entitled suit, of which proposed bill of exceptions the foregoing is a copy.

LORENZO A. BAILEY,
GEO. A. PREVOST,
JNO. RIDOUT,
Attorneys for Defendants.

Service of the foregoing notice and of a copy of the proposed bill of exceptions therein mentioned is hereby acknowledged this 24th day of May A. D., 1910.

EUGENE A. JONES,
Attorney for Plaintiff-.

60 *Directions to Clerk for Preparation of Transcript of Record.*

Filed Jul- 19, 1910.

* * * * * * *

The Clerk of said Court will please prepare the transcript of record on appeal, including therein Declaration, Plea, Joinder, Verdict, Remittitur, Judgment, Note of Appeal in open Court, Memo. showing filing of appeal bond, Submission of bill of exceptions and extension of time for docketing appeal in Court of Appeals, Bill of Exceptions and this order.

LORENZO A. BAILEY,
Attorney for Defendants.

61 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 60, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made

part of this transcript, in cause No. 51682 at Law, wherein Myra T. Hillman and Elizabeth Clement are Plaintiffs and Dora F. Robinson and C. Barnwell Robinson are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 9th day of August, 1910.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By ALF G. BUHRMAN,
Ass't Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 2202. Dora F. Robinson et al., appellants, vs. Myra T. Hillman et al. Court of Appeals, District of Columbia. Filed Aug. 10, 1910. Henry W. Hodges, clerk.

IN THE

Court of Appeals, District of Columbia

No. 2202.

DORA F. ROBINSON, *et al.*, *Appellants*,

vs.

MYRA T. HILLMAN, *et al.*, *Plaintiffs*.

BRIEF ON BEHALF OF APPELLANTS.

LORENZO A. BAILEY,
GEO. A. PREVOST,
JOHN RIDOUT,
Attorneys for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Court of Appeals, District of Columbia

No. 2202.

DORA F. ROBINSON, *et al., Appellants,*

vs.

MYRA T. HILLMAN, *et al., Plaintiffs.*

BRIEF ON BEHALF OF APPELLANTS.

STATEMENT OF CASE.

In the Supreme Court of the District of Columbia the appellees, hereinafter designated as the plaintiffs, sued the appellants, hereinafter designated as the defendants, claiming damages for obstructing an alleged right of way and sewerage connection at the rear of plaintiffs' premises. Issue was joined on the plea of not guilty. Upon the verdict of a jury judgment was rendered for plaintiffs, from which the defendants have duly prosecuted this appeal.

The verdict was upon each of the two counts of the declaration separately, viz., upon the first count, for obstruction

of alleged right of way, $1,500, and upon the second count, for obstruction of sewerage connection, $500, of which plaintiffs remitted $85.36 and judgment for plaintiffs was entered accordingly for $1,500, and $414.64.

The questions involved in this appeal were reserved by defendants in a bill of exceptions which is part of the printed record and which contains all the evidence at the trial. It contains sixteen exceptions: 1st and 2d for exclusion of evidence (Rec., 13-16); 3d to 9th, inclusive, for granting certain instructions to the jury at the request of plaintiffs (Rec., 22-24); 10th to 16th, inclusive, for refusing certain instructions to the jury as requested by defendants (Rec., 26-28).

1. The undisputed facts of record are as follows: On and for more than 30 years before July 20, 1868, Hugh Gelston was sole owner in fee simple of a parcel of land in Reservation 11, in the city of Washington, District of Columbia. Said parcel was in rectangular shape, having a width of 50 feet and a depth of 150 feet, and bounded on the west by Third street, northwest, on the north by a paved public alley, 14 feet wide, and on the east by a public alley 35 feet wide; the north half of said parcel being known as Lot 13 and the south half as Lot 12, in said Reservation 11. By deed of that date and duly recorded July 21, 1868, the said Hugh Gelston demised to Edward Wools for a term of 99 years the west 100 feet of said parcel. Thirty years later, in December, 1898, the title to the east 50 feet of said parcel became vested in the defendant, Mrs. Robinson, who, on August 28, 1908, caused the same to be recorded as Lot 36, in said Reservation 11. (See diagram at p. 14, of the printed record.)

The lease to Wools divided the demised property into three sub-lots, each 16 feet 8 inches in width and 100 feet in depth, which are now known and referred to, respectively, as premises Nos. 225, 227 and 229 Third street, north-

west; No. 225 being the southern lot, No. 229 the northern lot bounded by the 14-foot alley, and No. 227 the middle lot, which is the lot now occupied by the plaintiffs and mentioned in their declaration. (See diagram at p. 12 of the printed record.)

As to said premises No. 227, the leasehold interest of Wools under his lease from Hugh Gelston, was subsequently tranferred as follows: By deed dated Sept. 27, 1869, from Wools to Seth Hillman, and from him by deed dated July 21, 1870, to Lizzie Clements, and from her by deed dated Aug. 15, 1870, to Ann B. Hillman, who died November 13, 1902, and who by her last will and testament dated June 27, 1899, appointed the plaintiffs executrices thereof and bequeathed said leasehold interest to said executrices in trust to sell the same and out of the proceeds to pay certain legacies or in the alternative, if the plaintiffs elect to pay said legacies out of their private funds, then to sell said leasehold interest and divide the proceeds equally between themselves.

Wools built upon each of said sub-lots a brick house four stories in height, 16 feet 8 inches wide, fronting on Third street. These three houses were called the "Third street houses." The first occupant of the middle house and lot, No. 227, was Seth Hillman, who moved into it in 1869, immediately after it was built, and lived in it until he died in 1871. His wife, the said Ann B. Hillman, lived in it until her death, November 13, 1902, and her daughters, the plaintiffs, have occupied it as their home ever since 1869, and do not own any other property in said Reservation 11.

A year or so after Seth Hillman moved into No. 227, his lessor, Hugh Gelston, built four small brick houses, called the "Alley Houses," on the eastern end of said original parcel and fronting on the 35-foot alley, with a fence at the

rear thereof, in which were four gates opening into a 4-foot private alley which "then came into existence" (Rec., 10, top), and which was used by his tenants in the alley houses and in the Third street houses as an outlet from the rear of the premises to the 14-foot alley.

By deed dated January 11, 1870, Wools surrendered his leasehold interest in premises No. 229 to Hugh Gelston, who thereafter held the original parcel in fee subject only to the leasehold estates in Nos. 225 and 227 created by the lease to Wools.

Under the residuary clause of Hugh Gelston's will, dated May 26, 1873, his three children, Edward, Victor and Rebecca, became the owners of the original parcel in fee simple, as tenants in common. Thereafter, by deed dated January 3, 1876, Edward and Victor conveyed to their sister, Rebecca, said premises Nos. 225 and 227, being the southern and middle sub-lots, and she, by deed of same date, conveyed to them all the remainder of said original parcel, including premises No. 229 and also what is now Lot 36, containing the alley houses, all which, No. 229 and Lot 36, by subsequent conveyances and partition proceedings, became vested in fee, June 21, 1881, in said Victor, and thereafter, by his will, in his widow, Florence B. Gelston, who by deed dated December 30, 1898, and duly recorded December 31, 1898, conveyed to the defendant Mrs. Dora F. Robinson, in fee simple, the said Lot 36, describing it as "beginning at the northeast corner of said Lot 13 and running thence south on a public alley 50 feet to the southeast corner of said Lot 12, thence west 50 feet, thence north 50 feet, thence east 50 feet to the place of beginning, with the use of the alley located between the property now being described and the property fronting on Third street as now used and enjoyed, together with the improvements, ways, easements, rights, privileges, appurtenances and heredita-

ments to the same belonging or in anywise appertaining." The title to No. 229 remains in said Florence B. Gelston.

In making this purchase and in the subsequent management of the property, Mrs. Robinson was represented by her husband, Dr. Robinson, who is her co-defendant in this suit. He at once proceeded to restore the four alley houses which were in a wrecked condition. The entire Lot 36 was a nuisance, being covered with filth, ashes, and other débris which was even piled up against the sheds at the rear of the Third street houses and blocked up the outlet therefrom. That condition existed in the year 1891 and continued until 1899 when Dr. Robinson rebuilt the alley houses and put tenants in them and cleaned up and fenced the property, leaving a strip 5 feet wide between the rear fence and the rear of the sheds, and serving as a rear outlet for the tenants of the alley houses. This strip comprised the west five feet of Lot 36, and included the 4-foot strip mentioned in the first count of plaintiffs' declaration and now in dispute.

The Third street houses then and ever since 1869 were drained by sewer pipes running toward the rear and emptying into one terra cotta pipe at the rear of No. 227, at a point about 50 feet east of Third street, and thence by that pipe, through Lot 36, to a public sewer in the 35-foot alley. This pipe through Lot 36 was from 6 to 8 feet underground and until August, 1908, none of the parties to this suit knew of its existence.

In August, September and October, 1908, the defendants constructed on Lot 36 and covering the entire lot, a 5-story brick building, at a cost of $30,000. After working three or four days in clearing off the lot, Dr. Robinson, about August 17th, informed the plaintiffs that the survey of Lot 36 showed its west line to be at the rear of their shed, so that the water ran off the shed upon said Lot 36, and that it would be necessary to take out the back of the sheds dur-

ing the construction of defendants' building. He then asked them where they wanted the shed moved to; how wide an alley they wanted there; whether they wanted down spouts and how they were going to carry the water off. They stated in reply that they did not own the property and did not know what to do about it; that he should see the owners. They then asked him to write to the agents of the owners in reference to the location of the new passageway to serve as a rear outlet from No. 227. He wrote accordingly to the agents and received a letter in reply (R., 18) referring him to the records. This letter he showed at once to the plaintiffs, who then said they had no money to pay for moving the sheds and could not afford the expense; that they did not own the property and had nothing to do with the matter; that it was all between the agents and Dr. Robinson. He then ascertained that the only record of a private alley was in the deed to Mrs. Robinson, locating it outside the west line of Lot 36. He then cut off the rear 4 feet of the sheds and found that portion of the sheds covered an old brick pavement, which had evidently been formerly in use as a rear outlet from the Third street houses and which was evidently the location of the alley mentioned in the deed from Mrs. Gelston to Mrs. Robinson. The new building of the defendants was then constructed with its west wall on the west line of lot 36, leaving between that wall and the rear of the sheds a 4-foot strip where the old brick pavement was found and now used by the plaintiffs as their rear outlet from No. 227 to the 14-foot alley.

During the excavating for the new building, about Aug. 24th, the terra cotta sewer pipe was uncovered in Lot 36. This was the first notice or intimation the defendants had of its existence. Until then the plaintiffs themselves had never seen it. It was from 6 to 8 feet under ground and composed of sections, each 3 feet long, with open joints, without putty, cement or any other provision to prevent

leaking. Dr. Robinson at once notified the plaintiffs that it was in his way and he desired them to remove it. Having no response to this notice, Mrs. Robinson, on Sept. 19th, in writing, reminded the plaintiffs of Dr. Robinson's notice and notified them that it was broken and a nuisance and in the way of the new building and that on Sept. 21st, unless it was removed by them, she would cut it off and stop it up at the point where it entered her land, Lot 36 (Rec., 10), on which latter date it was, accordingly, cut off and stopped up by the defendants at the point where it entered Lot 36 and the plaintiffs were put to the necessity and expense of making plumbing connection with the public sewer in Third street. Their only response to Mrs. Robinson's written notice was: "I know nothing of this sewer. It don't belong to me. If you wish the sewer fixed, you will have to fix it yourself" (Rec., 22, mid.).

2. In the evidence the existence of a private alley used by the occupants of the alley houses as well as of the Third street houses as a rear outlet to the 14-foot public alley was not disputed; but not so as to its location. Miss Hillman, one of the plaintiffs, testified that the rear of the sheds in 1869 was 100 feet east of Third street and so remained until cut off by Dr. Robinson in September, 1908, and that during all that time the west 4 feet of Lot 36 constituted such private alley (Rec., 11).

As against this, witnesses for the defendants testified that the sheds did not exist in 1878, 1879, 1869, 1870, or early in the eighties until 1886 (Rec., 20-22, Muir, Beveridge, Anderson, Stewart, Hall).

The plaintiffs offered no explanation of the brick walk under the rear 4 feet of the sheds, paved with brick of an ancient make and showing at least 30 years of wear, covered by 6 inches of refuse (Rec., 19, mid., 20 mid.). Sereral witnesses testified to the existence of a brick paved private alley in use at that place when the alley houses were

new, about 1870, and as late as 1879 (Muir, Stewart, Hall, Rec., 20, 21, 22).

ASSIGNMENT OF ERRORS.

The court below erred as follows:

1. In excluding from the evidence the mortgage from Wools to Gelston (Rec., 13), and each of the Sections 11, 61, 64, 76 and 129 of the Plumbing Regulations (Rec. 14-16).

2. In refusing to instruct the jury upon the whole case, to return a verdict for the defendants (Rec., 22).

3. In granting each of the instructions Nos. 1, 4, 7, 8, 10 and 12 requested by the plaintiffs (Rec., 22-24).

4. In refusing to grant each of the instructions Nos. 1, 2, 3, 4, 7, 8 and 10 requested by the defendants (Rec., 26-28).

POINTS AND AUTHORITIES.

I.

The plaintiffs claim a right to the use of the passageway over Lot 36 and also a right to the use of the drain pipes through said Lot 36, as easements created, not by express grant, but by implication.

They base their claim, not on prescription, but on what they conceive to be the legal effect of the conveyances of January 3, 1876 (Rec., 7), by which the owners in fee simple, holding as tenants in common, divided the land among themselves. As stated by the trial justice in his charge (Rec., 29), the plaintiffs do not claim by prescriptive right but claim only "that at the time this entire tract was owned by a single owner, either that he built this sewer himself and established the alley himself, or somebody else did it with his approval and consent, and he, at the time,

intended that the alley or sewer should become a thing which should permanently pertain to this house, No. 227 Third Street," and that these passed as appurtenances under the deed of January 3, 1876, conveying No. 227 to Rebecca Elise Gelston.

It is in the evidence and undisputed that the Third street houses were built by Wools and not by his landlord, Hugh Gelston; that each house had a front outlet on Third street so that a rear outlet was one of convenience and not of necessity. There is no evidence to prove that Hugh Gelston or any of his devisees ever approved or consented to or had any knowledge of the passageway or the sewer in question.

This case comes strictly within the rule laid down in Stillwell vs. Foster, 80 Me., 333, 343, 14 Atl., 731, that trespass on the case does not lie for closing a private way adjoining plaintiffs' premises, where plaintiffs' title is under a deed describing specific bounds, not including the way, and the way is not one of necessity and is not alluded to in the deed.

It is well settled that an easement of convenience merely does not pass by implication under a conveyance or devise of the dominant estate and upon all the authorities the way claimed by these plaintiffs was one of convenience merely.

May vs. Smith, 14 D. C., 3 Mackey, 55.

Charleston Ry. Co. vs. Fleming, 118 Ga., 699, 703, 704.

The use of a sewer or drain, not visible but covered, does not pass by implication. In Butterworth vs. Crawford, 46 N. Y., 349, 353, judgment restraining obstruction of such drain was reversed "upon the single ground that the servitude claimed was not apparent," i. e., to the defendant when he bought the property through which the drain passed. To

the same effect is Dolliff vs. Boston & Me. R. R., 68 Me., 173, 176, where the court also stated that implied grants are not to be favored and should not be held to exist except in cases of clear necessity.

Counsel for plaintiffs at the trial cited and relied on the decisions in McPherson vs. Acker, 11 D. C., MacA. & M., 150, and Goodall vs. Godfrey, 53 Vt., 219, but they do not sustain the contention of the plaintiffs. In the former case the use was established and exercised by the owner and not by tenants; the grantee had express notice as to the alley and as to the drain the court found the use to be "an apparent and a continuous one." In the latter case the court said the test was whether the way was reasonably necessary and the use was by the owners and not by tenants for years.

Washburn, Easements and Servitudes, 4th Ed., p. 43 (star paging) cites the case of Daniel vs. Anderson, 31 L. J. (N. S.) Chancery, 610, in which two tenants from year to year of adjoining parcels, under the same landlord, used the premises in such manner and so long as to create a right of way in favor of one over the other parcel. The landlord then sold both parcels to different purchasers, granting in the deeds of conveyance "all subsisting rights or easements of way." In a suit to prevent obstruction of the way the court held no right of way passed to either purchaser over the land of the other, because, as to the landlord, the grantor, there never had been any subsisting easement in respect of either parcel, as he was not affected by what passed between the tenants while holding the same.

As to the sewer, there is no evidence as to who constructed it, excepting the inference from all the evidence that Wools, a tenant for years, who built the Third Street houses, then put it in as a temporary drain for those houses, there being then no public sewer at the front, in Third Street. The evidence excludes the inference that Hugh Gelston or any of his successors in title to lot 36 had any

knowledge of the terra cotta pipe sewer, as to its location or even of its existence. There was a large 3-foot sewer in the 14-foot alley to which Wools could have run his drainage through the land demised to him (Rec., 18, bottom). The alley houses built by Hugh Gelston a year or so after Wools built the Third Street houses had no drainage into the terra cotta sewer pipe.

As to the private alleyway claimed by the plaintiffs, they show by their own proofs that it never existed until it was created for the convenience and use of the tenants of the alley houses and that its subsequent use by the tenants of the Third Street houses was merely permissive and without claim of right by them.

Upon all the evidence, the defendants were entitled to the instruction to return a verdict in their favor and the court erred in refusing it.

II.

The court also erred as follows:

1. In excluding the mortgage which was offered with explanation by counsel (Rec., 13).

2. In excluding the Plumbing Regulations (Rec., 14-16), by which it appears that the maintenance of the terra cotta pipe through lot 36 was unlawful and that it was plaintiffs' duty to connect their plumbing with the Third Street sewer.

3. In granting the 1st and 7th instructions asked by the plaintiffs (Rec., 22, 23) because contrary to the law and the evidence.

May vs. Smith, *supra*.

4. In granting the 10th instruction asked by the plaintiffs (Rec., 24) because by testimony adduced by the plaintiffs (Rec., 12) it appears that the obstruction of the alleged way but leaving another equally convenient rear outlet did

not reduce the rental value of the plaintiffs' premises.

5. In refusing each of the instructions asked by the defendants (Rec., 26-28).

Respectfully submitted,

LORENZO A. BAILEY,
GEO. A. PREVOST,
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Attorneys for Appellants.

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

No. 2202.

DORA F. ROBINSON ET AL., APPELLANTS,

vs.

MYRA T. HILLMAN ET AL., APPELLEES.

BRIEF ON BEHALF OF APPELLEES.

EUGENE A. JONES.
CHAS. F. CARUSI.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

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MYRA T. HILLMAN ET AL., APPELLEES.

BRIEF ON BEHALF OF APPELLEES.

Statement of Case.

The appellees, Myra T. Hillman and Elizabeth Clement. brought an action for damages against the appellants in the court below on two counts, one for the permanent destruction of a right of way, and one for the destruction of the easement of certain waste and drain-pipes; the jury returned separate verdicts on the two counts, viz., $1,500.00 for the right of way and $500.00 for the drain-pipes; there being

a doubt as to the sufficiency of the evidence to support the verdict for the drain-pipes for the full amount ($500.00), the plaintiffs remitted $85.36, and judgment was entered separately for $1500.00 and $414.64, from which judgment this appeal was taken.

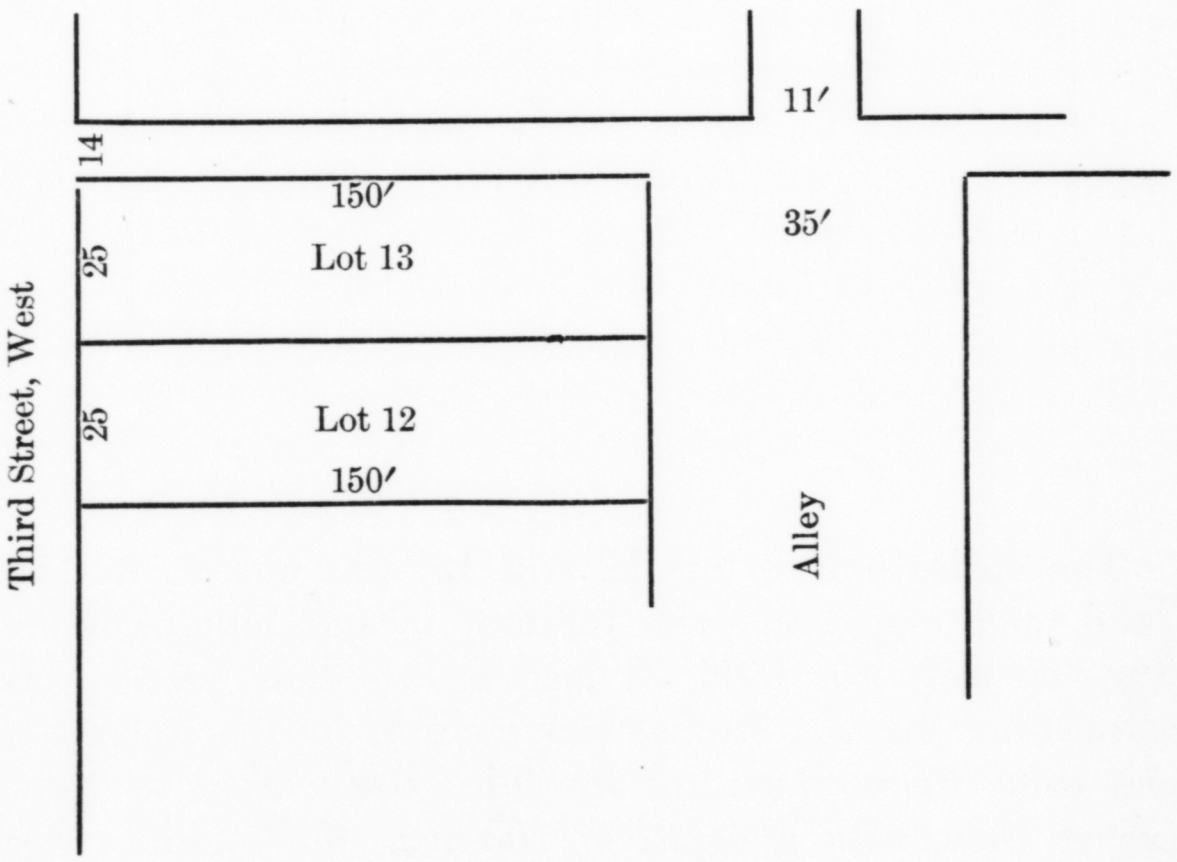
The plaintiffs claimed as the owners of a leasehold interest for ninety-nine years, renewable forever, in house and premises No. 227 Third street northwest, of which they were the occupants; the proof showed that they and their parents had occupied said premises continuously since 1869, and there was evidence tending to show that the plaintiffs and those through whom they claimed had continuously used and enjoyed the easement of the alley-way and drain-pipes from 1869 down to the time they were destroyed by the defendants (R., pp. 9, 10, 11, 12).

The proof and plats introduced in evidence also showed that house No. 227 Third street northwest was the middle house of three brick houses, built in 1869 at the same time; that house No. 227 was a basement house, with no side alley or outlet of any kind save through the alley-way, the destruction of which is complained of; that the plaintiffs' dining-room is located in the basement, and without the use of the rear exit their garbage and refuse matter would have to be brought through the dining-room (R., p. 10). There was also evidence tending to show that the rental value of said house, or the value of the use and occupation thereof, would be damaged to the extent of $10.00 per month by the deprivation of the right of way (R., p. 12), and that the damage sustained by reason of the destruction of the drains, cost of putting in new plumbing and making repairs, made necessary by the destruction of the old, was $414.64, the amount of the judgment on that count. The alley was at all times plainly visible, and its boundaries plainly defined by the backs of the woodsheds located on the rear of the three brick houses on Third street, on the one side, and the back fences enclosing the back yards of certain alley houses

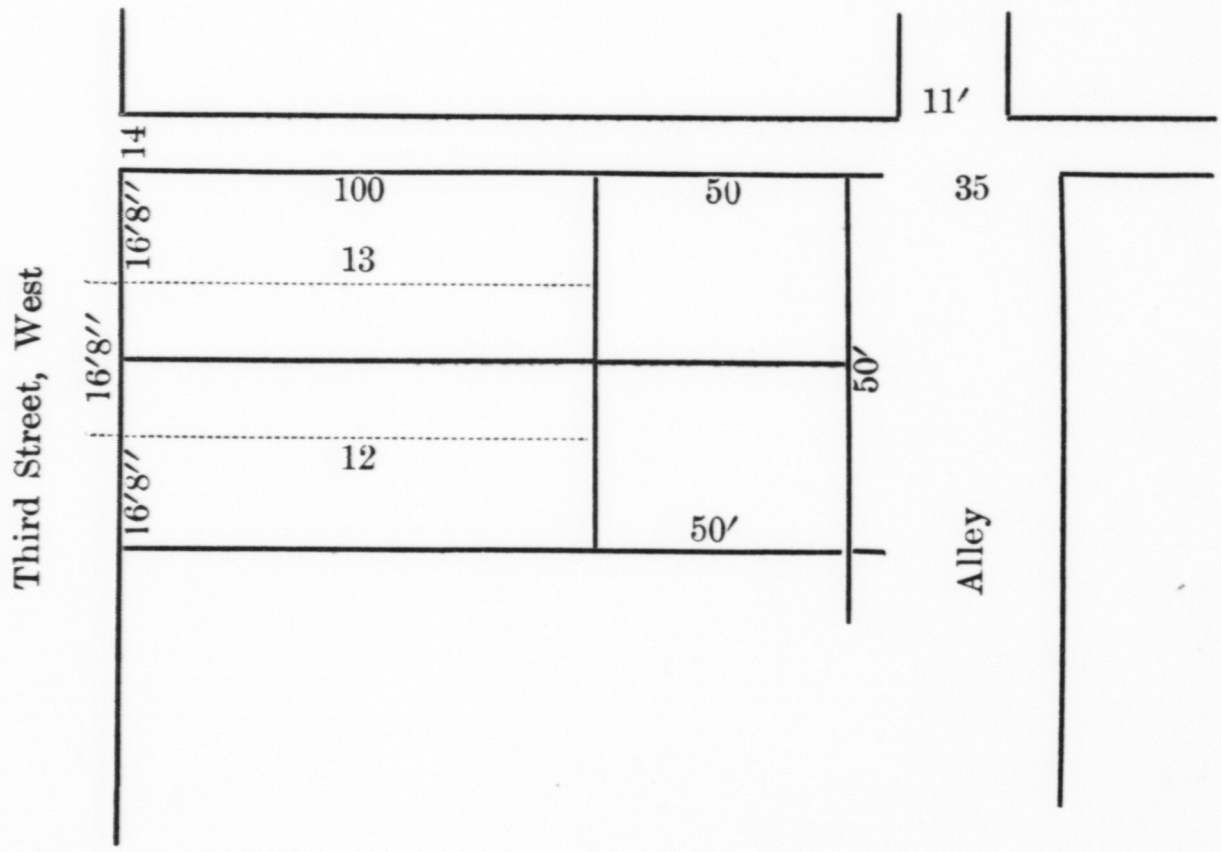
erected on the eastern portion of the property, on the other side (R., p. 10). This alley was also used by the tenants of the alley houses in common with the occupants of the three houses on Third street (R., p. 11). The drains, the destruction of which was complained of, were in existence in 1869 when paintiffs' ancestor took possession of the house, and ran underground through the property of the defendants to the 35-foot alley on the east of their property (R., p. 10). The drain-pipes connected, not only the plaintiffs' house, but also the houses adjoining it on the north and south. There was no public sewer on Third street until after the plaintiffs' drain had been cut off (R., p. 10).

Title to the Easements.

The *locus in quo* is a part of the original lots 12 and 13 in Res. 11, originally laid out as follows:



And at the time the action was brought the plaintiffs were claiming title to a leasehold interest in the parts embraced within the dotted lines shown on the plat below, the defendants were claiming all of the east 50 feet of said lots, and the plaintiffs were claiming in addition to their drainage easement, a right of way four feet wide over the shaded portion of the east 50 feet indicated on the plat below.



The entire parcel, lots 12 and 13, was owned, in 1868 (and for a long time prior thereto) by one Hugh Gelston, who, on July 20, 1868, divided it into four parcels, one comprising the east 50 feet now claimed by the Robinsons, and three parcels fronting on Third street, each 16 feet 8 inches wide, with a depth of 100 feet, the middle parcel being the one claimed by plaintiffs. On July 20, 1868,

Gelston leased these three parcels to Edward Wools for ninety-nine years, renewable forever, retaining the reversion in himself. Edward Wools built three houses on the three parcels, and on September 27, 1869, assigned all his interest in the middle parcel, improved by what is now house No. 227 Third street northwest, to Seth Hillman, and the title acquired by Seth Hillman became vested by mesne conveyances and wills in the plaintiffs (R., pp. 6, 7), Shortly after the erection of the Third street houses Hugh Gelston erected four little houses on the east 50 feet of the lots fronting on the 35-foot alley, shown on the foregoing plats, and the occupants of these houses, tenants of Hugh Gelston, used the alley-way shown on said plat, in common with the occupants of the Third street houses (R., pp. 10 and 11). This use, created by Hugh Gelston's tenants of the respective parcels, continued from 1867 down to the demolition of the four alley houses by the Robinsons, and when Hugh Gelston died, in 1874, an actual servitude existed in the east 50 feet of said lots for passage over the west four feet thereof, and for drain-pipes through the same, in favor of the houses on Third street. There had been created in the property of said Hugh Gelston a dominant and a servient tenement. By his will, Hugh Gelston, being still the owner in fee of all of lots 12 and 13, subject to the outstanding lease for 99 years as to the Third street houses, devised all of his interest therein to his three children, Edward H. Gelston, Victor d'L. Gelston, and Rebecca Elsie Gelston as tenants in common.

These three children, on January 3, 1876, made partition thereof among themselves, whereby Edward H. and Victor conveyed the middle lot on Third street and the southernmost lot on Third street to Rebecca, the deed including in its granting clause the following, "*together with all the rights, water-courses, lights, liberties, privileges, easements, and appurtenances to the said several lots of ground and premises hereby granted and conveyed or expressed or in-*

tended so to be, belonging or in anywise appertaining," and Rebecca conveyed to Edward H. and Victor the remaining portions of said lots 12 and 13, to wit, the northernmost parcel on Third street and the east 50 feet on the alley (R., p. 7). And thereafter said heirs and devisees enjoyed their respective properties in severalty—their respective tenants continuing to use and enjoy the easements of way and drain without let or hindrance. The title to the fee so far as house 227 Third street is concerned is still in Rebecca. The title to the east 50 feet became vested in Flora B. Gelston, who. in 1898, conveyed the same to Dora F. Robinson, the deed containing the following words (italics ours), "with the use of the alley located between the property now being described and the property fronting on Third street *as now used and enjoyed.*"

Findings of the Jury.

The jury found the following facts: 1. That at the time of the partition deeds between the heirs and devisees of Hugh Gelston, the plaintiffs, or those under whom they claim, had been continuously using and enjoying the certain right of way mentioned in the declaration, and that said right of way was visibly established and was reasonably necessary for the enjoyment of said property, that the use thereof was continued by the plaintiffs, and was never voluntarily abandoned by them, and that the defendants obstructed the same (R., pp. 22 and 23, pl'ffs' prayer 1).

2. That the passageway used in 1876 was located in the same place and over the same ground as the passageway mentioned in the first count of the declaration (R., p. 25, pl'ffs' prayer 12).

3. That at the time of the execution and delivery of said partition deeds, house No. 227 Third street northwest en-

joyed and possessed the right of drainage and sewerage through pipes running through the property now claimed by the defendants, that the use thereof had been continuous and was known to exist by the parties to said partition deeds, and was continued by the plaintiffs and those under whom they claimed, and that the defendants obstructed the same (R., p. 23, pl'ffs' prayer 7).

4. That said sewer was not constructed for temporary use, but was intended for permanent use (R., p. 25, def'ts' prayer 5).

5. That said sewer was constructed with the knowledge of the then owners of the property, through which it ran, or that said owners had knowledge, actual or constructive, of its existence (R., p. 25, def'ts' prayer 9).

6. That the alley and the sewer pipes were established as permanent fixtures to the land, at a time when the entire tract was owned by one person (Charge to the jury, R., p. 29).

Points and Authorities (*a*).

The Alley.

No man may have an easement in his own lands, but where the owner of two tenements burdens one with a servitude in favor of the other, or the owner of an entire tract subjects one part of the tract to a use in favor of the other part, a *quasi* easement exists, and upon a severance of the unity of title or possession, either by simultaneous conveyances or by partition among co-owners, a complete easement is created, and the respective alienees, or co-tenants, take the property allotted or conveyed to them in severalty, in the same plight and condition as it was before the severance,

that is to say, burdened or benefited by the easements precisely to the extent the property was a dominant or servient tenement before the severance.

Roberts *vs.* Roberts, 55 N. Y., 276.
Barnes *vs.* Loach, 4 Q. B. Div., 494.
James *vs.* Plant, 4 Adolph & E., 760.
Ellis *vs.* Bassett, 128 Ind., 118.
Goodall *vs.* Godfrey, 53 Vt., 219.
Burwell *vs.* Hobson, 12 Gratt. Va., 322.
Baker *vs.* Rice, 56 Ohio St., 463.
Kieffer *vs.* Imhof, 26 Penna. St., 438.
Kilgour *vs.* Ashcom, 5 H. & J. Md., 82.
McCarty *vs.* Kitchenman, 47 Penna. St., 239.
Phillips *vs.* Phillips, 48 Penna. St., 178.
Zell *vs.* Universalist Soc'y, 119 Penna. St., 390.
Rightsell *vs.* Hale, 90 Tenn., 556.
Greer *vs.* Van Mater, 54 N. J. Eq., 270.

Points and Authorities (*b*).

The Drain.

The only difference in the case between the easement of way and the easement of drain lies in the fact that at the time Robinson bought, the alley-way was physically apparent, while the drain-pipes were concealed under ground. Is there any difference in the law applicable to the two easements? The leading case on the drain question is Pyer *vs.* Carter, 1 Hurlstone & Norman's Rep., 916, holding that physical view of such an easement is not essential to its existence. This case is followed in England (Watts *vs.* Kelson, L. R. 6, Ch. 166), in New York (Lampman *vs.* Milks, 21 N. Y., 505), in Maryland (Janes *vs.* Jenkins, 34 Md., p. 1, decision by the late Ch. J. Alvey, who reviews the authorities and Eliason *vs.* Grove, 85 Md., 215), and has been the settled law in the District of Columbia for over thirty years (McPherson *vs.* Acker, MacArthur & Mackey, p. 150).

Whatever conflict may be found in the cases on the drain question, arising out of different views as to whether a buried drain is or is not an *apparent* easement (the word apparent having been construed in the leading case, *supra*, to mean something less than visual objectiveness), there is no conflict in the rule that a grantor may not derogate from his grant. This statement will be found in all the cases cited under this subdivision of the brief. The grant by Edward and Victor to Rebecca was broad enough to include by its express terms the easement of drain. Edward and Victor could not have asserted a title free from the servitude of drain, against Rebecca, and of course Flora B. Gelston, the successor in title to Edward and Victor, could only convey such title to Robinson as she had, to wit, a title subject to the drainage easement in favor of Rebecca and her tenants. The Robinsons are not without a remedy; an easement is an incumbrance, and every sale of real estate is coupled with an implied warranty of good title, free of incumbrance, so the amount of the verdict for the drain can be recovered by the Robinsons from Flora B. Gelston, if they have not slept on their rights. In other words, while an easement by *implication* (either by implied grant or by implied reservation) can only arise where the easement is *continuous* and *apparent,* a *non-apparent* easement will pass by the express words of a deed, and to the drain here passed by the express words of the deed from Edward and Victor to Rebecca, whether it was apparent or not, all the parties to the deed being cognizant of its existence, a fact found by the jury (R., p. 23, pl'fs' prayer 7). If the plaintiffs had title to the drain prior to the execution of the deed by Florence Gelston to Robinson, they still have it, because that deed cannot estop them.

Respectfully submitted,

EUGENE A. JONES.
CHAS. F. CARUSI.